Remand 1 9 2 1 4 Judge Davis —
Judge Swayne
Dunn.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~407~~ 194

THE HOME LIFE-INSURANCE COMPANY, OF BROOKLYN, NEW YORK, PLAINTIFF IN ERROR,

vs.

LUCINDA M. DUNN, ADMINISTRATRIX OF JOHN C. DUNN, DECEASED.

IN ERROR TO THE FIRST JUDICIAL DISTRICT COURT OF HAMILTON COUNTY, STATE OF OHIO.

FILED AUGUST 26, 1872.

Oct. Term 1872

SUPREME COURT OF THE UNITED STATES.

No. 407.

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INDEX.

	Original.	Print.
Complaint in error	1	1
Writ of error	7	2
Citation	9	3
Bond	11	4
Motion for leave to file petition in error	15	6
Petition in error	18	7
Petition	21	8
Exhibit "A"	27	9
Summons	34	11
Return	36	11
Answer	38	12
Issue	47	14
Verdict	50	15
Motion for new trial	51	16
Judgment	51	16
Bond	53	16
Petition for removal	56	17
Bond for removal	58	18
Order for removal	59	18
Summons	61	19
Answer of defendant	63	20
Order	66	20
Motion to strike out answer, &c	69	21
Motion to dismiss	71	22
Judgment	71	22
Clerk's certificate	74	23
Mandate	76	23
Verdict	78	24
Judgment	79	24
Clerk's certificate	83	25
Plaintiff 's petition	85	26
Summons	87	27
Judgment	90	27
Clerk's certificate	92	28

1 *Complaint in error.*

Supreme Court of the United States.

HOME LIFE INSURANCE COMPANY OF BROOKlyn, New York, plaintiff in error,
vs.
LUCINDA M. DUNN, ADMINISTRATRIX OF THE estate of John C. Dunn, deceased, defendant in error.

To the honorable the judges of the Supreme Court of the United States:

The Home Life Insurance Company of Brooklyn, New York, plaintiff in error herein, represents this: That heretofore in an action numbered 30724, in the court of common pleas, Hamilton County, State of Ohio, wherein the defendant in error was plaintiff, and the plaintiff in error herein was defendant, the said plaintiff in error, to wit, The Home Life Insurance Company, of Brooklyn, New York, filed its petition, bond, and affidavit for the removal of said cause, under the
2 act of Congress of the United States, to the circuit court of the United States for the southern district of Ohio, which petition was granted by said common pleas court, and an order made removing said cause to the said circuit court, and discontinuing all further proceedings in said common pleas court, and that thereafter, to wit, at the first term of the said circuit court of the United States next after the making of such order, to wit, at the April term of said court, 1869, the plaintiff in error filed in said court with the clerk thereof, on the first day of the session of said court, during said term, copies of all processes, pleadings, depositions, testimony, and other proceedings in said suit, and said suit was entered in said court, and then and there became and is now pending therein; and that thereafter, to wit, on May 6, 1869, the defendant in error, by her attorneys, came into said circuit court and filed a motion to dismiss said cause for want jurisdiction, which motion came on to be heard before the Hon. Noah
3 H. Swayne, one of the justices of this court, and upon consideration thereof, was by him overruled, and an order made accordingly, which order is still in force and wholly unreversed. That thereafter, to wit, on the 15th day of April, 1870, the defendant in error, by her attorneys, filed in the district court of the State of Ohio, within and for the first judicial district of said State, within the county of Hamilton, (case No. 1966,) a petition in error seeking to reverse said order of said common pleas, removing said cause as aforesaid; that thereafter, upon hearing, said district court decided that there was error in said order of removal, and accordingly reversed the same, and remanded said action to said court of common pleas for further proceedings.

Wherefore the plaintiff in error made a motion in the supreme court of the State of Ohio, the highest court in the State, for leave to file a petition in error, to reverse said order of the district court afore-
4 said, which motion was overruled and leave refused.

And thereupon, the cause being remanded to the court of common pleas aforesaid for trial, came on to be heard at the June term, 1871, and a jury was empannelled and sworn, who found the issues submitted to them for the said Lucinda M. Dunn, administratrix as afore-

said, and against said company, and the said court having overruled a motion for new trial by said company made, proceeded to order, adjudge, and decree, in conformity to the prayer of the petition of said Dunn, and rendered judgment in favor of said Lucinda M. Dunn, administratrix as aforesaid, and against said Home Life Insurance Company, in the sum of $2,525.26 & costs, and a bill of exceptions was duly signed, sealed, & allowed, and made part of the record by said court.

Whereupon the said company filed in the district court of Hamilton County a petition in error, praying the reversal of said judgment, & caused summons to issue & be served thereon. And afterwards
5 such proceedings were had that at the October term, 1871, of said district court, said cause came on to be heard, upon said petition in error, and the said judgment was affirmed by an order entered Nov. 3rd, 1871. All which will more particularly appear & be shown by the transcript of the record of the proceedings of said courts of common pleas, district court, & supreme court filed herewith.

Plaintiff complains to your honors that there was error in the proceedings of said district court of Hamilton County, in this: That they reversed the order of removal made by the common pleas court of said county as aforesaid, when they should have confirmed said order, and permitted no further proceedings in said action in said common pleas court; and that they afterwards affirmed, when they should have reversed said judgment.

Said company further says that said district court is the highest court in the State in which said action can be heard, and that the action calls in question the construction of a statute of the United
6 States. Wherefore they pray your honors to grant a writ of error directed to said district court, commanding them to send the record and proceedings with all things concerning the same to your, the said Supreme Court of the United States, and that upon inspection and consideration thereof, the aforesaid order of said district court may be reversed and set aside, and such other order made by your said court in the premises, as by law and right the plaintiff in error may be entitled to.

The Home Life Insurance Company, of Brooklyn, N. Y.,
By McGUFFEY, MORRILL, & STUART,
HOADLY & JOHNSON, *Attorneys.*

(Indorsed:) Supreme Court of the United States. Home Life Insurance Company, of Brooklyn, New York, plaintiff in error, vs. Lucinda M. Dunn, administratrix of the estate of John C. Dunn, deceased, defendant in error. Complaint in error.

7 Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the district court of the State of Ohio, within and for the first judicial district of said State, and within the county of Hamilton therein, greeting:

Because in the record and proceedings, and also in the rendition of a judgment, in a plea which is in the said district court before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between Lucinda M. Dunn, administratrix of John C. Dunn, plaintiff, and The Home Life Insurance Company of

Brooklyn, New York, defendant, wherein was drawn in question the construction of a statute of the United States, and the decision was against the right and privilege claimed by said defendant under such statute, a manifest error hath happened, to the great damage of the said Home Life Insurance Company, defendant as aforesaid, as, by its complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, on the first Monday in the month of December next, in the said Supreme Court, then and there to be held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this first Monday of December, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States of America the ninety-sixth.

[SEAL.] Attest: JOHN McLEAN, *Clerk.*

Allowed.

N. H. SWAYNE,
Asso. Jus. Sup. Court U. S.

NOV. 6TH, 1871.

(Indorsed:) Supreme Court U. S. Home Life Insurance Company of Brooklyn, New York, plaintiff in error, vs. Lucinda M. Dunn, administratrix of John C. Dunn, deceased, defendant in error. Writ of error.

S 1871. NOVEMBER 16. Pursuant to the command of the within writ, I have returned herewith a transcript of the record and proceedings of the within-stated judgment, excepting the bill of exceptions made part of record of common pleas court, June 12, 1871, containing amongst others the deposition of the witness T. D. Royse.

H. H. TINKER,
Clerk of the District Court of Ohio, within and for the County of Hamilton.
By EMIL HOFFMANN, *Deputy.*

9 UNITED STATES OF AMERICA, *ss:*

To Lucinda M. Dunn, administratrix of John C. Dunn, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the district court of the State of Ohio, within and for the first judicial district of said State, and within the county of Hamilton therein, wherein The Home Life Insurance Company of Brooklyn, New York, is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Noah H. Swayne, one of the justices of the said Supreme Court of the United States, this 6th day of November, in the year of our Lord one thousand eight hundred and seventy-one.

N. H. SWAYNE,
Asso. Jus. Sup. Court U. S.

10 (Indorsed:) Supreme Court of the United States. The Home Life Insurance Company of Brooklyn, New York, plaintiff in error, vs. Lucinda M. Dunn, administratrix of John C. Dunn, deceased, defendant in error. Citation.

Served a true copy of the within upon Mess. Standish & Brown, attorneys for defendants in error, personally, and by leaving the same with them, on this 10th day of November, A. D. 1871.
Heart, H. C., $1.00.

JOS. E. HEART,
Sheriff Ham. Co., O.
By C. F. HORNBERGER, *Deputy.*

STATE OF OHIO, *Hamilton County, ss:*

C. F. Hornberger makes oath and says that on the 10th day of November, A. D. 1871, he served a true copy of the within on Mess. Standish & Brown, attorneys for defendant in error, personally, and by leaving the same with them.

C. F. HORNBERGER.

Sworn to before me, and subscribed in my presence, on this 10th day of November, A. D. 1871.
12 c'ts paid by pl'ff.
[SEAL.]

H. H. TINKER,
Clerk Court Common Pleas,
By EMIL HOFFMANN, *Deputy.*

11 (Copy.)

Supreme Court of the United States.

THE HOME LIFE INSURANCE COMPANY OF Brooklyn, New York, plaintiff in error,
vs.
LUCINDA M. DUNN, ADMINISTRATRIX OF JOHN C. Dunn, deceased, defendant in error.

Know all men by these presents, that we, John S. Perkins & John R. Wright, are held and firmly bound unto Lucinda M. Dunn, administratrix, etc., in the sum of five thousand and fifty dollars and fifty-two cents, to be paid to the said Lucinda M. Dunn, administratrix, etc., her successors or assigns, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and
12 each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this

(Signed) JOHN S. PERKINS. [SEAL.]
JOHN R. WRIGHT. [SEAL.]

Whereas the above-named Home Life Insurance Company of Brooklyn, New York, hath prosecuted a writ of error to the Supreme Court

of the United States, to reverse the judgment rendered in the above-entitled suit by the district court of the State of Ohio, within and for the first judicial district of said State, and within the county of Hamilton therein: Now, therefore, the condition of this obligation is such, that if the above-named Home Life Insurance Company of Brooklyn, New York, shall prosecute its said writ of error to effect, and an-
13 swer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN S. PERKINS. [SEAL.]
JOHN R. WRIGHT. [SEAL.]

Sealed and delivered in the presence of—
TOM AMBROSE.

Approved Nov. 6th, 1871.

N. H. SWAYNE,
Asso. Jus. Sup. Court U. S.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, John McLean, clerk of the circuit court of the United States in and for said district, before whom the above bond was taken and acknowledged, hereby certify that the said John S. Perkins and John R. Wright, who have signed the above obligation, are personally known to me to be good and sufficient for a much larger sum than the penalty of the bond.

14 In testimony whereof I have hereunto set my hand and affixed the seal of said court at Cincinnati, this 3d day of November, 1871.

[L. S.] JOHN McLEAN, *Clerk.*

THE STATE OF OHIO,
Hamilton County, sc't:

I, H. H. Tinker, clerk of the district court of the State of Ohio, for the fifth circuit, hereby certify that the foregoing is a true copy of a bond filed on the 10th of November, 1871, in my office, in a cause wherein The Home Life Insurance Company of Brooklyn, N. Y., are plaintiffs in error, and Lucinda M. Dunn, adm'x, &c., is defendant in error, lately pending in said court.

Witness my hand and the seal of the court at Cincinnati, this 16th day of November, 1871.

[SEAL.] H. H. TINKER, *Clerk*,
By W. M. TREVOR, *Deputy.*

[Five-cent. int.-rev. stamp, canceled.]

(Indorsed:) Supreme Court of the United States. Home Life Ins. Co. of Brooklyn, N. Y., pl'ff in error, vs. Lucinda M. Dunn, administratrix, &c., def't in error. Copy of bond, filed by pl'ff in error in the district court of Ohio, for the fifth circuit, (Hamilton Co.)

15 *Motion for leave to file petition in error to district court of Hamilton County.*

Supreme court of the State of Ohio, of the term of December, A. D. 1870, to wit, Feb'y 28th, A. D. 1871.

THE STATE OF OHIO, *City of Columbus:*

HOME LIFE INSURANCE COMP'Y,
vs.
LUCINDA M. DUNN.

Ordered, that the motion in this case be, and the same is hereby, overruled.

I, Rodney Foos, clerk of the supreme court of Ohio, do hereby certify that the foregoing order is truly taken and correctly copied from the journal of said court.

Witness my hand and the seal of said court this second day of June, A. D. 1871.

[SEAL.] RODNEY FOOS, *Clerk.*
By *Deputy.*

[5-ct. int.-rev. stamp, canceled.]

(Indorsed:) O. B. 431. Supreme court of the State of Ohio. No. 79. Motion docket. Home Life Ins. Company vs. Lucinda M. Dunn. December term, 1870. Certificate of journal entry. M. B. 2445.

16 Pleas at the city of Cincinnati, in the county of Hamilton and State of Ohio, before the district court of the State of Ohio' within and for the fifth circuit, held by the Honorable Charles C Murdock, the Honorable M. F. Force, and the Honorable Joseph Cox, judges of the court of common pleas, sitting as judges of said district court, for the term of October, in the year of our Lord one thousand eight hundred and seventy.

LUCINDA M. DUNN, ADMINISTRATRIX OF JOHN C. Dunn, dec'd, pl'ff in error,
against
THE HOME LIFE INSURANCE COMPANY OF Brooklyn, New York, def't in error.
} 1966. Error.

17 Be it remembered that heretofore, to wit, on the 15th day of April, A. D. 1870, the plaintiff in error above named, acting by Standish and Brown, her attorneys, filed in the office of the clerk of this court her certain petition in error, clothed in the words and figures following:

Petition in error.

State of Ohio, Hamilton County district court.

LUCINDA M. DUNN, ADMINISTRATRIX OF JOHN C. Dunn, deceased, pl'ff,
vs.
THE HOME LIFE INSURANCE COMPANY OF Brooklyn, New York, defendants.
} Petition in error.

The said Lucinda M. Dunn, as administratrix of John C. Dunn, dec'd, plaintiff, complains of the said Home Life Insurance Company, defend-

ant, for that on the 20th day of February, A. D. 1869, at
18 the Jan'y term of the court of common pleas for Hamilton County, Ohio, said defendant filed a motion for the removal of a certain cause therein, entitled as above, to the circuit court of the United States for this district, wherein the said Lucinda M. Dunn, as administratrix of John C. Dunn, deceased, was plaintiff, and said Home Life Insurance Company, of Brooklyn, New York, was defendant, which motion said court granted at said January term; a copy of the record of the judgment and proceedings in which case, duly certified, is hereto attached, marked A, and made a part of this petition, and the said A B avers that there is error in the said record and proceeding in this, to wit: First, that the said court erred in granting the said motion
19 of said defendant permitting a removal of said cause to the circuit court of the United States.

Second, that said court committed other errors apparent upon the face of the record.

The said Lucinda M. Dunn, as administratrix of John C. Dunn, deceased, plaintiff, therefore prays that said judgment may be reversed, and the said plaintiff restored to all things she has lost by reason thereof.

STANDISH & BROWN,
Att'ys for Pl'ff in Error.

To the clerk of the district court of Hamilton County, Ohio:

Issue summons on behalf of plaintiff against said defendant, the Home Life Insurance Company, of Brooklyn, New York, directed to the sheriff of Ham Co. Endorse: Pet. in error.

STANDISH & BROWN,
Att'ys for Pl'ff.

And at the same time, to wit, on the 15th day of April, 1870, the
20 plaintiff in error filed a certain transcript, clothed in the words and figures following, to wit:

Transcript.

Pleas at a separate session of the court of common pleas begun and held at the court-house in the Cincinnati, in the county of Hamilton, and State of Ohio, in the term of January, in the year of our Lord one thousand eight hundred and sixty-nine, before the Hon. , one of the judges of said court.

Ham. com. pleas.

LUCINDA M. DUNN, ADMINISTRATRIX OF JOHN C. Dunn, deceased, plaintiff,
against
THE HOME LIFE-INSURANCE COMPANY OF Brooklyn, New York, defendant.
} 30724. Money.

Be it remembered that, heretofore, to wit, on the 24th day of
21 January, in the year of our Lord one thousand eight hundred and sixty-eight, the plaintiff above named, acting by Standish and Brown, her attorneys, filed in the office of the clerk of this court her certain petition and præcipe, clothed in the words and figures following, to wit:

Petition.

Court of common pleas, Hamilton County, Ohio.

LUCINDA M. DUNN, AS ADMINISTRATRIX OF John C. Dunn, deceased, *against* THE HOME LIFE-INSURANCE COMPANY OF Brooklyn, New York. } Petition.

Your petitioner, Lucinda M. Dunn, respectfully represents that she has been appointed and qualified as administratrix of the estate of John C. Dunn, deceased, and that the defendant is an incorporated company, doing a life-insurance business within the county of Hamilton,
22 and State of Ohio, and in pursuance of the laws thereof, but that it is located at the city of Brooklyn, in the State of New York. Your petitioner further represents that, when the said John C. Dunn was an infant, said defendant urged him to take a life-insurance policy of two thousand dollars upon his own life in favor of himself, all of which he then declined, because he was expecting to enter the military service of the United States. Whereupon said defendant assured him that said policy would permit him to enter upon and engage in the military service of the United States at any time by his paying annually the sum of one hundred dollars in addition to the peace-premium to be named in said policy. This last proposition the said John C.
23 Dunn then accepted, and consented that said defendant should execute a policy in accordance therewith. Instead of doing this, said defendant executed a policy (a copy of which is hereto attached, marked A, and made a part of this petition) that prohibited the said John C. Dunn from entering upon or engaging in the military service of the United States without the written consent of this defendant previously obtained, and imposed the same upon the said John C. Dunn while he was an infant, without making known to him its contents.

In December, 1864, said policy was in full force, and the peace-premiums paid thereon for five months in advance, when the said John C. Dunn, being an infant, sent his mother to T. D. Royse, then a general agent of this defendant, and the only one with whom he had ever
24 dealt, to learn from him where and to whom he should pay his war-premium on his policy, for he was about to enter the military service of the United State, and wished to save it from lapsing. Said agent refused to tell her where or to whom she or her son could pay the war-premium on his policy, but promised her that he would attend to that matter. In pursuance of this agreement the said John C. Dunn signed the muster-rolls of the United States Army January 6th, 1865; was mustered, and entered a camp for military instructions and discipline within this State known as Camp Chase, Ohio, where he died an infant on the seventh day of March following.

Proof of his death was received by this defendant on the 10th day of April, 1865, without any objections to its sufficiency. Whereupon
25 by terms of said policy the sum of one thousand nine hundred and fifty-seven dollars and twenty-five cents became due and payable from the said defendant to the said plaintiff on the 10th day of June, 1865, which sum the said defendant has wholly neglected and refused to pay, though often requested so to do.

Wherefore your petitioner prays that, at the final hearing of this case, the said defendant may be compelled to reform said policy of insurance

in this, to wit, that that part of it which provides that the said John C. Dunn shall not enter upon or engage in any military or naval service whatsoever without the previous written consent of this defendant be so amended as to read that the said John C. Dunn may at any time enter upon or engage in the military service of the United States
26 by annually paying to this company the sum of one hundred dollars in addition to the premiums heretofore mentioned in this policy, and also that a judgment may be awarded thereon in behalf of said plaintiff for the sum of one thousand nine hundred and fifty-seven dollars and twenty-five cents, with interest thereon from the 10th day of June, 1865, and for her costs herein, and for such other and further relief as in law and in equity she may be entitled.

STANDISH & BROWN,
For Petitioner.

STATE OF OHIO,
Hamilton County, ss:

Personally came Lucinda M. Dunn, and made oath that she is the plaintiff named in this petition, and that it is true according to the best of her knowledge and belief.

LUCIND' M. DUNN.

27 Sworn to and subscribed before me this 16th day of January, 1868.

S. M. DISBORN, *J. P.*

To the clerk of the court of common pleas, Hamilton County, Ohio:

Issue summons against the Home Life Insurance of Brooklyn, New York, returnable according to law. Endorsed: Suit on policy of life insurance. Amount claimed $1,957.25, with interest thereon from the day of May, 1865, & costs of suit.

STANDISH & BROWN,
Att'ys for Pl'ff.

CIN., O., *Ja'y* 24, 1868.

"A."—Copy.

The Home Life-Insurance Company. Number 3864. Age 19. Amount, $2,000. Premium $34.20.

By this policy of assurance, in consideration of the representations and agreements contained in the application therefor and of the sum of thirty-four dollars and twenty cents, to them in hand paid by John C. Dunn, and of the annual premium of thirty-four dollars and
28 twenty cents, to be paid on or before the sixth day of November in each and every year during the continuance of this policy, do assure the life of John C. Dunn, of Elizabethtown, in the county of Hamilton, State of Ohio, in the amount of two thousand dollars, for the term of life, with participation in profits; and the said Home Life-Insurance Company do hereby promise and agree to and with the said John C. Dunn, well and truly to pay or cause to be paid the said sum assured to his executors, administrators, or assigns, within sixty days after due notice and proof of the death of the said John C. Dunn, the balance of the year's premium, if any, and all indebtedness due or to become due to the company to be first deducted therefrom.

Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is granted by this company and accepted by the said John C. Dunn, upon these express conditions, that, if the statements, declaration, and agreement, made by or for him, contained in the application, bearing date the second day of November, 1863, upon the faith of which this policy is made, or any part thereof, shall be found untrue in any respect, or in case the said John C. Dunn shall not pay or cause to be paid the premium, as aforesaid, on or before the day herein mentioned for the payment thereof, or for any note or notes which may be given to and received by said company in part-payment of any premium on the day or days when the same shall become due, except the note given for half the annual premium, and made payable at twelve months after date, or shall not renew such last-mentioned note when the same shall become payable and pay the interest or discount thereon, or in case the said John C. Dunn shall, without the written consent of this company, previously obtained, pass beyond the inhabited and cultivated regions within the settled limits of the United States, (except into the inhabited and cultivated regions within the settled limits of the Canadas, Nova Scotia, or New Brunswick,) or shall, without such previous consent, visit those parts of the United States which lie west of the one hundred' degree of west longitude, or shall between the first day of July and the first day of November visit those parts of the United States which lie south of the parallel of the southern boundary of the State of Tennessee, or shall enter upon an aerial voyage or a voyage upon the high seas, or shall engage as mariner, engineer, fireman, conductor, agent, messenger, laborer, or servant, in any capacity in service on any sea, sound, inlet, river, lake, or railroad, or in the manufacture of gunpowder or fire-works, or in submarine operations, or mining, or shall enter upon or engage in any military or naval service whatsoever, (the militia not in actual service excepted,) or in case he shall die by his own hand or by the hands of justice, or in consequence of a duel, or of the violation of any law of the United States, or of any State or country; then and in every such case the said company shall not be liable for the payment of the sum assured or any part thereof, and this policy shall cease and be null and void and of no effect. And it is further understood and agreed by and between the parties hereto that the dividend of profits, if any, which may become payable by virtue of this policy to the holder thereof, shall be applied towards the payment of the note taken for half premiums aforesaid; and that if this policy shall cease or become null or void, the said John C. Dunn, his heirs, executors, administrators, or assigns, shall be liable to pay the said company the amount of all notes taken for premiums, which shall remain unpaid, except the balance remaining unpaid on the note taken for half premium and made payable at twelve months from date, and that the said last-mentioned note is to be cancelled by the said company on the surrender and cancellation of the said policy, and also that this policy shall not be assigned without the consent of the company, in writing, previously obtained. And it is also further understood and mutually agreed that in case the said John C. Dunn shall be or shall become in any sense an inebriate, the company shall have the right to declare this policy cancelled, and shall be absolved from all liability under it on paying to the holder thereof, or tendering in payment the amount of all unearned premiums, actually received thereon up to the time of such payment or tender of payment. In witness whereof the Home Life-Insurance Company have,

by their president and secretary, signed and delivered this contract, at the city of Brooklyn, in the State of New York, this sixth day
34 of November, one thousand eight hundred and sixty-three.

GEORGE H. RIPLEY,
Secretary.
WALTER S. GRIFFITH,
President.

And thereupon on the same 24th day of January, A. D. 1868, a summons was issued from the office of the said clerk, directed to the sheriff of Hamilton County, clothed in the words and figures following, to wit:

Summons.

THE STATE OF OHIO,
Hamilton County, ss:

To the sheriff of the county of Hamilton:

You are commanded to notify The Home Life Insurance Company of Brooklyn, New York, defendant, that it has been sued by Lucinda M. Dunn, administratrix of John C. Dunn, deceased, plaintiff, in the court of common pleas of Hamilton County, and that unless it answer by the 22d day of February, A. D. 1868, the petition of the said plaintiff
35 against it, filed in the clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this summons on the 3d day of February, A. D. 1868. Witness my hand and the seal of the said court at Cincinnati, this 24th day of January, one thousand eight hundred and sixty-eight.

T. BISHOP DISNEY,
Clerk of the Court of Common Pleas,
Hamilton County, Ohio.
[L. S.] By EMIL HOFFMAN, *Deputy.*

Which summons is endorsed:
(Endorsed:) Summons in action for the recovery of money. Amount claimed $1,957.25, with interest from the day of May, A. D. 1865, for which judgment will be taken if you fail to answer. To 3d day of Feb'y 1868. Standish & Brown, attorneys.

And afterwards, to wit, on the 3d day of February, A. D. 1868,
36 the said sheriff returned the said summons to the office of the cl'k with his return of service thereon endorsed, as follows, to wit:

Return.

1868, January 31st. Served the within-named defendant, The Home Life Insurance Company of Brooklyn, New York, by delivering a true copy hereof personally to W'm M. Doughty, of the firm of Doughty & Bruehl, agent of said company, at the usual business office of said company in this county.

H. SCHLOTMAN, *Sheriff.*
By L. C. FRINTZ, *Deputy.*

And afterwards, to wit, on the 22d day of February, A. D. 1868, the said defendant, by McGuffey & Coles, its attorneys, filed in the office of the clerk aforesaid its certain motion, clothed in the words and figures following, to wit:

Motion.

Ham. Com. Pleas.

LUCINDA M. DUNN, ADM'X OF JOHN C. DUNN dec'd, pl'ff,
vs.
37 HOME LIFE INS. CO. OF BROOKLYN, N. Y. } 30724.

Motion by defendant to require plaintiff to separate and number her causes of action and to make her petition more definite & certain.

McGUFFEY & COLES,
Att'ys for Def't.

Default.

And on the same 22d day of February, 1868, the defendant having failed to file an answer or demurrer, the clerk of this court, in accordance with the rules of the court, entered on the docket a default against the said defendant.

And afterwards, to wit, on the 23d day of March, A. D. 1868, an order was made by the court and entered on the journal, as follows:

Mi. 416.—*Mo. overruled.*

LUCINDA M. DUNN, ADM'X,
vs.
THE HOME LIFE INS. CO. } 30724.

This cause being submitted to the court upon motion, that part
38 of said motion requiring plaintiff to separate and number her causes of action is by the court overruled. But plaintiff is required to insert within ten days the date when notice of loss was given.

And the cause was continued to the term of May, A. D. 1868, and on the 12th day of June, 1868, an entry was made on the journal as follows:

Now comes the defendant and by leave of court files an answer.

Which said answer is clothed in the words and figures as follows, to wit:

M. 263.—*Answer.*

The State of Ohio, county of Hamilton, court of common pleas.—Action 30724.

LUCINDA M. DUNN ADMINISTRATRIX OF JOHN C. Dunn, dec'd, plaintiff.
vs.
THE HOME LIFE INSURANCE COMPANY OF BROOKlyn, New York, defendant. } 30724. Answer.

39 The defendant now comes, and answers to the petition of plaintiff as amended under leave of the court granted to plaintiff in the premises, and says that is not true that the defendant ever urged plaint-

iff's intestate to take a life-insurance policy upon his own life; it is not true that defendant every assured plaintiff's intestate that such life-insurance policy would permit intestate to enter upon and engage in the military service of the United States at any time upon paying annually the sum of one hundred dollars in addition to the peace premium to be named in said policy; it is not true that defendant ever made any proposition to plaintiff's intestate to issue any policy upon any terms, or on any conditions other than the terms and conditions which are set out and specified in the policy which defendant issued to plaintiff's in-
40 testate; or would ever have consented to issue any policy to said intestate upon his proposition for insurance, except upon the identical terms and conditions which are contained in the policy which was issued to plaintiff's intestate.

Further answering, defendant denies that T. D. Royse was ever a general agent of defendant or represented defendant in any way, other than in receiving applications for insurance. Defendant denies that said Royse ever had any authority to do, on defendant's behalf, any of the acts and things charged by plaintiff as having been done by said Royse. Defendant further says that no agent of this defendant has or ever had any authority to waive, alter, or change any of the conditions of any policy; but on the contrary, all the defendant's
41 agents are expressly prohibited from doing so. And defendant denies the whole of plaintiff's statement as contained in her petition in regard to the alleged application to T. D. Royse for the purpose of learning where and to whom the war premium on intestate's policy could be paid, and in regard to the alleged refusal of said Royse to tell where or to whom such war premium could be paid, and in regard to said Royse's alleged promise to attend to the matter, defendant denies that there was ever any agreement or consent on defendant's part, that said John C. Dunn (plaintiff's intestate) should or might sign the muster-rolls of the United States Army, or in any manner enter any military service whatever. Defendant denies that proof of plaintiff's
42 intestate's death was received by defendant without any objection to its sufficiency, as alleged by plaintiff. Further answering, defendant says that plaintiff's intestate, the said John C. Dunn, on the second day of November, 1863, made application to defendant for a policy of insurance on his own life, in the sum of two thousand dollars, representing himself as being nineteen (19) years of age, and by occupation a farmer; that no intimation was made or given by said Dunn to the defendant of any desire or intention to enter the military service of the United States; that said application was accepted and a policy, in the usual form, issued to said Dunn on the 6th day of November, 1863, in which policy it is expressly stipulated and provided,
43 among other things, that it is the true intent and meaning of this policy, and the same is granted by this company (the defendant) and accepted by said John C. Dunn, upon the express condition that * * * * * * * * *
if the said John C. Dunn shall enter upon or engage in any military or naval service whatsoever, (the militia not in actual service excepted,)
* * * * * * * * *
then and in every such case the said company (the defendant) shall not be liable for the payment of the sum assured or any part thereof, and this policy shall cease and be null, void, and of no effect. Defendant says that said John C. Dunn accepted said policy and paid the premiums thereon, and was fully aware of its contents, for more than fourteen months prior to the time at which he engaged in the mili-

44 tary service of the United States, then engaged in war, on or about the fifth day of January, 1865, fourteen months after the said policy had been accepted by him, and two months after he had settled the second year's premium; and that all the terms and conditions of said policy, and particularly the prohibition of entering military service, were understood by said Dunn and by the said Lucinda M. Dunn, his mother, (now plaintiff in this action in capacity of administratrix of said John C. Dunn,) at the time said John entered said military service as aforesaid.

Further answering, defendant says that no application was ever made to this defendant, on behalf of said John C. Dunn, for any permission to enter military service; that no such permission was
45 ever granted; and that by entering said military service the said John C. Dunn violated the terms of the policy issued to him by defendant and by him accepted, and that thereby the said policy became and remains void and of no effect. Defendant denies all the allegations in plaintiff's petition not hereinabove specifically admitted, and says that the defendant is not liable to plaintiff in any manner or for any sum whatever, and that plaintiff is not entitled to recover any sum whatever from this defendant, and is not entitled to have the policy, which was issued by defendant to plaintiff's intestate, re-formed or altered in any manner whatever. Wherefore defendant prays judgment against plaintiff, that plaintiff may be restrained from
46 making any claim upon the defendant in the premises, and that the court will make all proper orders.

McGUFFEY & COLES,
Att'ys for Def't.

THE STATE OF NEW YORK,
County of Kings, ss:

Walter S. Griffith, being duly sworn, says that he is the president of the Home Life Insurance Company of Brooklyn, New York, defendant in this action, and that he believes the facts stated in the foregoing answer to be true.

WALTER S. GRIFFITH.

Sworn and subscribed by the said Walter S. Griffith before me this 11th day of April, 1868.

[L. S.] GEO. C. RIPLEY,
Notary Public.

And on the 28th day of October, A. D. 1868, the cause was "sent to jury," and was continued to the November term.

47 And afterwards, to wit, on the 8th day of December, in the term of November, A. D. 1868, the following issues were made up between the parties and filed in the office of the clerk of said court, to wit:

Issue.

LUCINDA M. DUNN, ADM'X OF JOHN C. DUNN, dec'd, pl'ff,
vs.
THE HOME LIFE INS. CO. OF BROOKLYN, NEW York, def't. } No. 30724.

This day this cause came on to be heard, whereupon a jury were empaneled and sworn to try the issues joined between the parties:

First. Does the policy declared upon conform to the original agreement between these parties.

Second. Did said defendant promise the said John C. Dunn, at
48 or before he procured his application for insurance, that the said Dunn could enter upon or engage in the military service of the United States, for an extra annual premium of five per cent., payable annually, at any time, without forfeiting the policy which the company would issue to him.

Third. Did the defendant cause, authorise, or induce the said John C. Dunn to enter the military service of the United States without his first paying the defendant an extra premium of five per cent. on the amount for which he was then insured by defendant.

Fourth. Did defendant ever receive proper proof of the death of said John C. Dunn, deceased; and, if he did, at what date did he receive it?

And on same 8th day of December, A. D. 1868, in the term
49 of November, the following entry was made in said cause on the journal of said court, to wit:

Mi. 535.—*Jury sworn.*

This day came the said parties, by their attorneys, and also came the following-named persons as jurors, to wit:

1. JOHN FRIZZEL,
2. JOHN ENGLISH,
3. HOSEA STEELMAN,
4. WATKIN FREE,
5. BENJ. HOUSMAN,
6. JOHN HAMILL,
7. WOLF FROST,
8. GEO. W. BRADY,
9. JOS. WILLARD,
10. W'M LONDEN,
11. JA'S W. STEVENS,
12. W. A. SHAW,

Who were duly empanelled and sworn to well and truly try the issue joined and filed in the cause, and the trial proceeds, and the said jury having heard the testimony as adduced in part by the parties, court adjourned until to-morrow morning at half-past nine o'clock.

And afterwards, to wit, on the 9th day of December, in the
50 term and year last aforesaid, the following entry was made in said cause on the journal of said court.

Mi. 536.—*Verdict.*

This day again came the said parties, by their attorneys, and also came the jury heretofore empanelled in the cause, and the trial proceeded; and the said jury having heard the remaining testimony as adduced by the parties and the arguments of counsel and the charge of the court thereon, retire to their room, in charge of the sheriff, to consult of their verdict, now come into open court with their verdict, in writing, and say:

We, the jury, in the issue joined, find as follows, viz:

To the first question we answer: No.

To the second and third questions: Yes.

To the fourth, that proper proof of the death of John C. Dunn was received by defendant on the 10th of April, 1865.

W. A. SHAW, *Foreman.*

51 And afterwards, to wit, on the 10th day of December, A. D. 1868, there was filed in the office of the clerk of said court a certain motion clothed in the words and figures following, to wit:

Motion for new trial.

Ham. com. pleas.

S. M. DUNN, ADM'X, *vs.* HOME LIFE INS. CO. } 30724.

Motion by defendant to set aside verdict & for a new trial.

McGUFFY & COLES,
Att'ys for Def't.

And afterwards, to wit, on the 23d day of December, in the term and year last aforesaid, the following proceedings and judgment were had and entered on the journal of said court, to wit:

M. 558.—*Judg't.*

This cause came on to be heard upon the motion of the defendant to set aside the verdict herein and grant a new trial, and was argued by counsel; upon consideration whereof the court overruled the same.

52 It is therefore considered by the court that the plaintiff recover her damages herein assessed, and the costs to be taxed.

Whereupon the defendant comes and demands a second trial, by entering on the records of this court notice of said demand, and the court being of the opinion that the case is one in which a trial by jury may be demanded by either party, the court order that said second trial be granted, upon the defendant entering into an undertaking in the sum of four thousand dollars, in accordance with the statute in such case made and provided.

And afterwards, to wit, on the 28th day of December, A. D. 1868, came the said defendant and filed in the office of the clerk of said
53 court, its certain bond for a 2d trial, clothed in the words and figures following, to wit:

Bond. (207, *book* 2.)

Know all men by these presents that we, James P. Kilbreth and R. A. W. Bruehl, of the county of Hamilton, and State of Ohio, are held and firmly bound unto Lucinda M. Dunn, administratrix of John C. Dunn, dec'd, plaintiff, in the just and full sum of four thousand ($4,000) dollars, good and lawful money of the United States of America; for the payment whereof well and truly to be made unto the said plaintiff we do hereby bind ourselves, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated at Cincinnati, this 28th day of December, anno Domini eighteen hundred & sixty-eight.

Whereas in the term of November, A. D. 1868, of the court of common pleas, held at the court-house in the city of Cincinnati,
54 within and for the county of Hamilton aforesaid, by the consideration of the Honorable , one of judges of said court, sitting in separate session, the said plaintiff obtained a judgment against The Home Life Insurance Company of Brooklyn, New York, defendant, for the sum of two thousand dollars and costs of suit to be

taxed. And thereupon the said defendant demanded a second trial of this action:

Now, the condition of the above obligation is such, that if the said defendant, the party obtaining such second trial, shall abide and perform the order and judgment of the court, and shall pay all moneys, costs, and damages which may be required of or awarded against the said defendant, consequent upon such second trial by the said court, then, and in such case, the said obligation to be void and
55 of none effect; otherwise to be and remain in full force and virtue in law.

JA'S P. KILBRETH. [SEAL.]
R. A. W. BRUEHL. [SEAL.]

Signed, sealed, and acknowledged in the presence of—
EMIL HOFFMAN.

Filed Dec. 28th, 1868, and approved.
T. BISHOP DISNEY,
Clerk Court Common Pleas Hamilton County, Ohio,
By EMIL HOFFMAN, *Deputy.*

And afterwards, to wit, on the 20th day of February, A. D. 1869, there was filed in the office of the clerk of said court a certain motion clothed in the words and figures following, to wit:

Motion to remove cause, &c.

Ham. com. pleas.

L. M. DUNN, ADM'X, *vs.* THE HOME LIFE INS. CO. } 30724.

Motion by defendant to remove this cause to the United States circuit court in and for the seventh judicial circuit.

McGUFFEY & COLES,
Att'ys for Def't.

56 And on the same 20th day of February, A. D. 1869, came said defendant and filed in the office of the clerk of said court a certain petition for the removal of said cause to the circuit court of the United States, clothed in the words and figures following, to wit:

Petition for removal.

The State of Ohio, Hamilton County, court of common pleas.

LUCINDA M. DUNN, ADMINISTRATRIX OF JOHN C. Dunn, dec'd, *vs.* THE HOME LIFE INSURANCE COMPANY. } 30724. Petition for removal.

To the Hon. the court of common pleas:

The defendant, The Home Life Insurance Company, represents that it is a foreign corporation, having its legal existence in the State

of New York, under and by virtue of the laws of the State of New York, although doing business through its agents in the State of
57 Ohio; that the plaintiff in the above-entitled action is a citizen of the State of Ohio; that the amount in controversy exceeds five hundred ($500) dollars; and that said company (the defendant) has reason to believe, and does believe, that from prejudice or local influence defendant will not be able to obtain justice in this court.

Defendant here offers, and is ready to give good and sufficient surety, according to the requirement of the act of Congress for such case made and provided, and thereupon prays for the removal of the above-entitled suit into the circuit court of the United States in and for the seventh judicial circuit.

THE HOME LIFE INSURANCE COMPANY.
By WALTER S. GRIFFITH,
Its President.

THE STATE OF NEW YORK,
County of Kings, ss:

58 Walter S. Griffith, of lawful age, being first duly sworn, says that he is president of The Home Life Insurance Company, defendant in the above-named suit, and that he believes the facts stated in the foregoing petition to be true.

WALTER S. GRIFFITH.

Subscribed in my presence and sworn to before me by said affiant on the 26th day of December, 1868.

[SEAL.] GEO. C. RIPLEY,
Notary Public, Kings County, New York.

And afterwards, to wit, on the 3d day of March, A. D. 1869, came said defendant and filed in the office of the clerk of said court its certain bond for the removal of said cause to the United States circuit court, clothed in the words and figures following, to wit:

Bond for removal.

(Bond not on file among papers; lost or mislaid.)

59 And on same 3d day of March, in the term of January, A. D. 1869, the following order was made in said cause and entered on the journal of said court, to wit:

Min. 317.—Order to remove, &c.

The defendant having heretofore filed in this court his petition (under the act of Congress of the United States) praying for the removal of this cause to the circuit court of the United States, together with an affidavit, such as is required by said act of Congress, this cause came on to be heard on motion by defendant that the prayer of said petition should be granted. And the court, having considered the same, and the said defendant, having offered and given good and sufficient surety to the satisfaction of the court, for the said defendants entering in such circuit court, on the first day of its next session, for this district,
60 copies of all process, pleadings, depositions, testimony, and other proceedings in said suit now on file in this court in the cause aforesaid, it is now by the court ordered that the said surety be, and

the same is hereby, accepted, and that no further proceedings be had or taken in this court in the cause aforesaid. To all of which the plaintiff excepts.

THE STATE OF OHIO,
Hamilton County, ss:

I, H. H. Tinker, clerk of the court of common pleas, within and for said county of Hamilton, hereby certify the above and foregoing to be a full and correct transcript of the record of the proceedings and judgment (except of the bond for removal, &c., therein mentioned as
61 missing) had and entered in said court in the case of Dunn, adm'x vs. Home Life Ins. Co., No. 30724, as the same appears from the files and journals of said court in my office remaining.

Witness my hand and the seal of said court, at Cincinnati, this 13th day of April, A. D. 1870.

[L. S.]

H. H. TINKER,
Court Com. Pleas, H. Co.

[Int.-rev. stamp, 5 cts.]

And thereupon, on the same 15th day of April, A. D. 1870, there was issued out of the office of the clerk of this court a certain summons directed to the sheriff of Hamilton County, clothed in the words and figures following, to wit:

Summons.

STATE OF OHIO,
Hamilton County, ss:

To the sheriff of the county of Hamilton:

62 You are hereby commanded to notify the Home Life Insurance Company of Brooklyn, New York, defendant in error, that Lucinda M. Dunn, administratrix of John C. Dunn, dec'd, plaintiff in error, has filed a petition in the clerk's office of the district court of Hamilton County, asking the reversal of a judgment which it obtained against her at the January term, one thousand eight hundred and seventy, of the court of common pleas of Hamilton County; and that, unless the said defendant in error attend on the first day of the next term of the said district court, which will commence on the 18th day of April, in the year one thousand eight hundred and seventy, said judgment may be reversed.

You will make due return of this summons on or before the said day.

63 Witness my hand and the seal of the said district court, at Cincinnati, this 15th day of April, one thousand eight hundred and seventy.

H. H. TINKER,

[L. S.] *Clerk of the District Court of Hamilton County, Ohio.*
By EMIL HOFFMAN, *Deputy.*

And afterwards, to wit, on the 23d day of April, A. D. 1870, the defendant in error, by its attorneys, filed in the office of said clerk its certain answer, clothed in the words and figures following:

Answer.

Hamilton district court.

LUCINDA M. DUNN, ADMINISTRATRIX OF John C. Dunn, deceased, plaintiff in error,
vs.
THE HOME LIFE INSURANCE COMPANY OF Brooklyn, New York, defendant in error.
} 1966.

64 And now comes the aforesaid defendant in error, and for answer to the petition in error, says:

1. That in the record and proceedings aforesaid there is no error.

2. That heretofore, to wit, at the first term of the circuit court of the United States within and for the southern district of Ohio, next after the 20th day of February, 1869, to wit, at the April term of said court, 1869, the defendant in error filed in said court with the clerk thereof, on the first day of the session of said court during said term, viz, on April 6, 1869, copies of all process, pleadings, depositions, testimony, aad other proceedings in said suit, and said copies were then and there entered as aforesaid, in said court of the United States. And afterwards,

65 to wit, on May 1, 1869, came the plaintiff in error, by her attorneys, Standish & Brown, and filed in said circuit court of the United States her motion in the words and figures, (after stating the title of said cause,) following, to wit:

Lucinda M. Dunn, administratrix of John C. Dunn, deceased, and plaintiff herein now comes by her counsel, Standish and Brown, and asks the court to dismiss this suit for want of jurisdiction, and to remand it to the court from whence it came.

STANDISH & BROWN.

And thereupon such proceedings were had in said cause and court, that said motion came on to be heard before said court, the Honorable Noah H. Swayne, one of the justices of the Supreme Court of the United States and presiding judge of said court, being present and presiding, and having been argued by counsel for said plaintiff and defend-

66 ant, was by said court overruled, and thereupon said court, on May 13, 1869, made and entered upon the journal of the proceedings of said court, an entry, in the words and figures (after stating the title of said cause) following, that is to say: "This cause coming on to be heard, on motion of plaintiff to dismiss the action for want of jurisdiction, and the court upon argument of counsel, and consideration of said motion, adjudge that the same be overruled, which is accordingly done, and entry thereof is hereby ordered."

Which order of said circuit court is yet in full force in said court and wholly unreversed.

And afterwards, on the seventeenth day of January, 1870, came said Lucinda M. Dunn, administratrix of John C. Dunn, dec'd, into

67 said circuit court, and moved the court, by her attorneys, for leave to amend her original petition, which original petition, so sought to be amended, is the same filed in this court when said cause was commenced; which motion said circuit court granted, and on the same day entered on the journal of its proceedings an order to that effect; and said Dunn, as such administratrix, on the same day filed her said

amended petition in said circuit court in said cause, and said amended petition is now and there pending:

Wherefore the defendant in error says that the plaintiff in error, her said petition in error, and all right to file and prosecute the same, has waived, and is estopped to recover the relief therein sought.

McGUFFEY, & MORRILL, & HOADLY,
Attorneys for Def't in error.

68 THE STATE OF OHIO, *Hamilton County, sct:*

Alexander H. McGuffey, being duly sworn, says that he is one of the attorneys of the Home Life Insurance Company, of Brooklyn, New York, defendant in error; that the said defendant in error is not a resident of this (Hamilton) county, and that he (the affiant) believes the facts stated in the foregoing answer to be true.

A. H. McGUFFEY.

Sworn to before me, & subscribed in my presence, this 22d day of April, 1870.

W'M STRUNK,
Notary Public, Hamilton County, Ohio.

And afterwards, to wit, on the 25th day of April, in the year last aforesaid, the plaintiff in error filed her certain motion, in the words and figures following:

Motion to strike answer from files.

Hamilton County district court, State of Ohio.

69 LUCINDA M. DUNN, ADM'X OF JOHN C. Dunn, dec'd, pl'ff in error, *vs.* THE HOME LIFE INS. CO., OF BROOKLYN, NEW York, def't in error. } 1966. Motion to strike ans. from files.

Said plaintiff now comes and moves the court to strike the answer of defendant in error herein from the files, as irrelevant to the case and unauthorized by law.

STANDISH & BROWN,
Att'ys for Pl'ff.

And on the same 25th day of April, A. D. 1870, the said sheriff returned the said summons heretofore issued to him to the office of the clerk of this court, with his return thereon endorsed as follows, to wit:

Return.

1870, April 18th. Served the within-named, The Home Life Insur-
70 ance Company, of Brooklyn, New York, by delivering a true copy hereof to E. M. Johnson, of the firm of Hoadly, Jackson & Johnson, attorneys of record for the defendant in error, personally.

D. WEBER, *Sheriff.*
By IRA H. BIRD, *Deputy.*

And on the 2d day of June, A. D. 1870, an order was made by the court and entered on the journal, as follows, to wit:

Leave to ans.

Leave is given to the defendant to file answer, reserving to the court the right to strike the same from the files at the next term of this court, or make any *any* other disposition therewith that may seem proper; this entry not to prejudice the plaintiff in any respect.

And on the 6th day of October, A. D. 1870, the defendant in error, by its attorneys, and filed a motion in the words and figures following, to wit:

Motion to dismiss.

Hamilton district court.

LUCINDA M. DUNN, ADMINISTRATRIX,
vs.
71 THE HOME LIFE INSURANCE COMPANY.

Motion to dismiss the petition in error, for the reason of the existence of the facts stated in the petition in error.

HOADLY & MORRILL,
Atty's for Defendant in Error.

And afterwards, to wit, on the 2d day of November, A. D. 1870, in the term of October of that year, the court rendered a certain judgment in said cause, and the same was entered on the journal in the words and figures following, to wit:

Mi. 95.—*Judg't.*

This cause came on for hearing this day, upon the petition in error, the transcript of the proceedings and order of the court of Hamilton common pleas and the arguments of counsel; on consideration whereof the court find there is error in said proceedings and order.

72 It is, therefore, considered by the court that the said proceedings and order of the court of common pleas aforesaid be, and the same are hereby, reversed, and that plaintiff in error recover of the defendant in error her costs herein expended, and execution is awarded therefor.

It is further ordered that a special mandate be sent to the court of common pleas of Hamilton county, to carry this judgment into execution.

Judgment reversed and cause remanded.

And afterwards, to wit, on the 5th day of November, A. D. 1870, in the same term, an order was made by the court in this cause, and entered on the journal, as follows, to wit:

Mi. 100.—*Entry overruling motion, nunc pro tunc.*

This cause came on to be heard, upon the defendant's motion to
73 dismiss the petition and summons in error, for the reason of the facts stated in the second paragraph of the answer filed by the defendant in error to the petition in error, and said facts being proved to be truly stated in said answer; nevertheless the court overruled said motion; to which overruling the defendant in error excepted.

And this entry is ordered to be held and taken, as if made simultaneously with the order of reversal, heretofore entered at this term in this cause.

74 THE STATE OF OHIO,
Hamilton County, sct:

I, H. H. Tinker, clerk of the district court of the State of Ohio, within and for the county of Hamilton, hereby certify that the foregoing is a true and complete transcript of the record of the proceedings and judgment had and entered in said court, in the case of Lucinda M. Dunn, administratrix of John C. Dunn, dec'd, plaintiff in error, against The Home Life Insurance Company of Brooklyn, New York, defendant in error, No. 1966, as the same appear upon the files and journals of the court remaining in my office.

Witness my hand and the seal of the court at Cincinnati, this 5th day of June, A. D. 1871.

[SEAL.]

H. H. TINKER,
Clerk of Hamilton District Court,
By W. M. TREVOR, *Deputy.*

[5-c't int. rev. stamp, canceled.]

75 Pleas at the city of Cincinnati, in the county of Hamilton, and State of Ohio, before the court of common pleas, within and for the county of Hamilton, and State of Ohio, held by the Honorable Manning F. Force, one of the judges thereof, for the term of June, in the year of our Lord one thousand eight hundred & seventy-one.

LUCINDA M. DUNN, ADMINISTRATRIX OF JOHN C. Dunn, plaintiff,
against
THE HOME LIFE INSURANCE COMPANY OF Brooklyn, New York, defendant. } 30724.

Be it remembered that heretofore, to wit, on the 2d day of November, A. D. 1870, a certain mandate from the district court of the State
76 of Ohio, for the county of Hamilton, was received and entered on the journal of this court, in the words and figures following:

Mandate.

District court, October term, 1870.

THE STATE OF OHIO,
Hamilton County, ss:

To the hon. the judges of the court of common pleas of Hamilton County, Ohio, greeting:

Whereas in a certain action which was lately pending in our said district court, wherein Lucinda M. Dunn, adm'x of Jno. C. Dunn, dec'd, was plaintiff, and The Home Life Insurance Co. of Brooklyn, N. Y., defendant, the following order was made in said cause, viz: This cause came on for hearing this day upon the petition in error, the transcript of the proceedings and order of the court of Hamilton common pleas, and the arguments of counsel; on consideration whereof the court find there is error in said proceeding and order. It is therefore considered by the court that the said proceedings and order of the court of

77 common pleas aforesaid be, and the same are hereby, reversed, and that plaintiff in error recover of the defendant in error her costs herein expended, and execution is awarded therefor. It is further ordered that a special mandate be sent to the court of common pleas of Hamilton County to carry this judgment into execution.

I, H. H. Tinker, clerk of the district court of Hamilton County, do hereby certify that the above and foregoing order is truly taken & correctly copied from the journal of said district court. Witness my hand and the seal of said court, at Cincinnati, this 2d day of November, 1870.

[L. S.] H. H. TINKER, *Clerk.*
By H. H. FINCH, J'R, *D'p'ty.*

And the cause was continued from term to term, until the term of June, A. D. 1871, and at said term, to wit, on the 12th day of June, A. D. 1871, an entry was made on the journal of the court, as follows:

Mi. 408.—*Jury sworn.*

78 This day came the said parties, by their attorneys, and also came the following-named persons as jurors, to wit: 1. Philip Weatherby; 2, H. Feldman; 3, M. L. Price; 4, G. H. Peters; 5, W. A. Wellshear; 6, Elliott Clark; 7, Patrick Flaherty; 8, F. Wolfers; 9, John Jackson; 10, H. D. Chapman; 11, G. H. Scott, and 12, John Steele, who were duly empaneled and sworn in this cause according to law, and the trial proceeded; and the said jury having heard the testimony as adduced by the parties, the arguments of counsel in part, court adjourned until to-morrow morning, June 13th, 1871, at 9½ o'clock.

And afterwards, to wit, on the 13th day of June, A. D., 1871, an entry was made on the journal of the court, as follows:

Min. 410.—*Verdict.*

This day again came the said parties by their attorneys, and also came the said jury heretofore empanelled in this cause; and the
79 trial progressed, and the said jury having heard the remaining arguments of counsel, and the charge of the court, retire to their room in charge of the sheriff, to consult of their verdict; and now come said jury into court, with their verdict in writing, signed by their foreman, and say:

We, the jury in the issue submitted to us, find as follows:
To the first issue we say, No.
To the second issue we say, Yea.
To the third issue we say, Yea.
To the fourth issue we say, Yea.

W'M A. WELLSHEAR.

And afterwards, to wit, on the sixth day of July, A. D. 1871, in the same term, a judgment was rendered by the court, and entered on the journal as follows:

Mi. 432.—*Judg't.*

This day this cause came on to be heard on the motion of the defendant to set aside the verdict of the jury, and for a new trial, and
80 was argued at length, by counsel for the defendant, and the court being fully advised in the premises, finds that said motion is not

well taken, and should be overruled, and that said plaintiff is entitled to the relief prayed for in her petition herein, and that said defendant did hold out and represent to said John C. Dunn, deceased, at and before he gave his application for a policy in the company of said defendant, that the same would give him the right to enter the military service of the United States, at any hour, for an extra annual premium of five per cent., and that the policy asked to be re-formed herein, was drawn up entirely by said defendant, and signed only by said defendant, and that said defendant delivered it to said John C. Dunn, deceased, while he was a minor, without informing him that it was differ-
81 ent from the aforesaid representations of said defendant, on which it was obtained, and that while said policy was in full force, said defendant did cause said John C. Dunn to enlist in the military service of the United State' without first having paid the extra premium for that purpose heretofore stated, five per cent., and that said defendant did receive due proof of the death of said John C. Dunn, deceased, on or before 10th day of April, A. D. 1865, and that said defendant is indebted to said plaintiff on the cause of action herein, in one thousand eight hundred and fifty-eight $\frac{25}{100}$ dollars, with six per cent. interest thereon, from the 10th day of June, A. D. 1865; amounting to the sum of $2,525.36 at the first day of this term, and her costs herein.

82 Wherefore it is ordered, adjudged, and decreed by the court that said policy of insurance be re-formed so as to provide that the said John C. Dunn may enter upon or engage in the military service of the United States upon the terms and in the manner heretofore set out herein, and that said plaintiff recover of said defendant the sum of two thousand five hundred and twenty-five $\frac{36}{100}$ dollars, ($2,525.36,) with six per cent. interest thereon since the 5th day of June, A. D. 1871, and for her costs herein taxed at , and that in default of payment thereof, that execution issue therefor; to all of which defendant excepts.

Motion overruled & final decree.

And afterwards, to wit, on the 7th day of July, A. D. 1871, an entry was made on the journal as follows: (M. 435.)

83 Now comes the defendant and presents the court his certain bill of exceptions, which the court allow, sign, seal, and order to be made part of this record.

THE STATE OF OHIO,
County of Hamilton, ss:

I, H. H. Tinker, clerk of the court of common pleas, within and for the county of Hamilton, State of Ohio, hereby certify that the foregoing is a true and complete transcript of the proceedings had in the case of Lucinda M. Dunn, adm'x, &c., against The Home Life Insurance Company of Brooklyn, N. Y., from the time of the entering of the mandate of the district court until the final judgment in the cause, except the bill of exceptions of the defendant.

Witness my hand and the seal of the court at Cincinnati, this 15th November, 1871.

[SEAL.]

H. H. TINKER,
C. Co't Hamilton Common Pleas,
By W. M. TREVOR,
Deputy.

[5-ct. int.-rev. stamp, canceled.]

84 Pleas at the city of Cincinnati, in the county of Hamilton and State of Ohio, before the district court of Ohio, within and for the fifth circuit, held by the Honorable Charles C. Murdock, the Honorable Manning F. Force, and the Honorable Joseph Cox, judges of the court of common pleas, sitting as judges of said district court, for the term of October, in the year of our Lord one thousand eight hundred and seventy-one.

THE HOME LIFE INSURANCE COMPANY OF Brooklyn, New York, plaintiff in error, *against* LUCINDA M. DUNN, ADMINISTRATRIX OF JOHN C. Dunn, dec'd, defendant in error. } Error.

85 Be it remembered that heretofore, to wit, on the 22d day of July, A. D. 1871, the said The Home Life Insurance Company, of Brooklyn, New York, plaintiff in error, acting by its attorneys, McGuffey & Morrill, and George Hoadly, filed in the office of the clerk of this court its certain petition in error, clothed in the words and figures following:

Petition in error.

Hamilton County district court.

THE HOME LIFE INSURANCE COMPANY OF Brooklyn, N. Y., pl'ff in error, *vs.* LUCINDA M. DUNN, ADM'X OF JOHN C. DUNN, deceased, def't in error. } Petition in error.

Now comes The Home Life Insurance Company, of N. Y., plaintiff in error herein, and complains of Lucinda M. Dunn, administratrix, &c., defendant herein, for this, that at the June term of the court of common pleas of Hamilton County, A. D. 1871, the said Lucinda M. Dunn
86 recovered a judgment and obtained an order and decree, by the consideration of said court, against the plaintiff herein, in a certain action then pending in said court, No. 30724, wherein this defendant was plaintiff and this plaintiff defendant, a transcript of which judgment, order, and decree, and the journal entries in the case, duly certified, together with the original pleadings and papers in the case are herewith filed herein, and by reference made part hereof. And the said Home Life Insurance Company avers that there is error in the said record and proceedings in said case in this, to wit: 1. That the said court erred in the instructions given to the jury on the trial of said action. 2. That the facts set forth in the petition in said action are not suffi-
87 cient in law to maintain said action. 3d. That the findings of the jury on the trial of said action were contrary to law & evidence. 4. That the court erred in overruling the said Home Life Insurance Company's motion to set aside the finding of the jury and for a new trial. 5th. That the said judgment, order, and decree was given for the plaintiff in said action when they should have been given for the defendant therein. Wherefore the plaintiff prays that said judgment, order, and decree may be reversed, and that it may be restored to all things it has lost by reason thereof.

McGUFFEY & MORRILL, & GEO. HOADLY,
Att'ys for Pl'ff in Error.

And thereupon there was issued out of the office of the clerk a summons in error in the words and figures following, to wit:

Summons in error.

STATE OF OHIO,
Hamilton County, ss:

88 To the sheriff of the county of Hamilton:

You are hereby commanded to notify Lucinda M. Dunn, administratrix of John C. Dunn, defendant in error, that The Home Life Insurance Company of Brooklyn, New York, plaintiff in error, has filed a petition in the clerk's office of the district court of Hamilton County, asking the reversal of a judgment which the defendant in error obtained against the plaintiff in error at the June term, A. D. 1871, of the court of common pleas of said Hamilton County; and that unless the said Lucinda M. Dunn, adm'x, &c., attend on the first day of the next term of the said district court, which will commence on the second day of October, in the year one thousand eight hundred and seventy-one, said judgment may be reversed. You will make due return of this summons on or before said day.

Witness my hand and the seal of the said district court, at
89 Cincinnati, this 22d day of July, A. D. 1871.

[L. S.] H. H. TINKER,
Clerk of the District Court of Hamilton County, Ohio.
By W. M. TREVOR, *Deputy.*

And afterwards, to wit, on the 4th day of September, A. D. 1871, the sheriff aforesaid returned the said summons to the office of the said clerk, with his return thereon endorsed, as follows:

1871, SEPTEMBER 1ST.—Served the within-named Lucinda M. Dunn, administratrix of John C. Dunn, dec'd, defendant in error, by delivering a true copy hereof to N. H. Standish, personally, of the firm of Standish & Brown, attorneys of record for said defendant in error.

JOS. E. HEART, *Sheriff,*
By IRA H. BIRD, *Deputy.*

And afterwards, to wit, on the 3d day of November, A. D. 1871, in the term of October, the court rendered a judgment, and caused the same to be entered on the journal as follows, to wit:

90 *Judg't affirmed.—(Mi. 25.)*

THE HOME LIFE INSURANCE COMPANY
ag't
LUCINDA M. DUNN, ADM'X OF JNO. C. DUNN.

This cause came on for hearing this day upon the petition in error, the transcript of the proceedings, and judgment of the court of Hamilton common pleas, and the arguments of counsel. On consideration whereof the court find there is no error in said proceedings and judgment.

It is therefore considered by the court that the said proceedings and judgment of the court of common pleas aforesaid be and the same are hereby affirmed; and that defendant in error recover of the plaint-

iff in error her costs herein expended, and execution is awarded therefor; and the court being of opinion that there was reasonable ground for proceedings in error allow no penalty; to all of which plaintiff in error excepts.

91 It is further ordered that a special mandate be sent to the court of common pleas of Hamilton County to carry this judgment into execution.

Judgment affirmed and cause remanded.

92 THE STATE OF OHIO,
Hamilton County, sct:

I, H. H. Tinker, clerk of the district court of Ohio within and for the fifth circuit, being the county of Hamilton, hereby certify that the foregoing is a true and complete transcript of the pleadings, process, and orders and judgment had in the said court in the case of The Home Life Insurance Company, plaintiff in error, against Lucinda M. Dunn, adm'x, &c., defendant in error, as the same appear of record on the files and journals of the court remaining in my office.

Witness my hand and the seal of the court, at Cincinnati, this 16th day of November, A. D. 1871.

[SEAL.]

H. H. TINKER,
Clerk Hamilton District Court.
By W. M. TREVOR, *Deputy.*

[5-ct. int. rev. stamp, canceled.]

(Indorsed:) 30724. Hamilton common pleas. Lucinda M. Dunn, adm'x of Jno. C. Dunn, vs. The Home Life Insurance Company, of Brooklyn, N. Y. Transcript of the proceedings in the court of common pleas and district court. Fee, (additional,) $4.90, p'd by McGuffy & Morrill.

(Indorsement on cover:) No. 407. The Home Life Insurance Company of Brooklyn, New York, plaintiff in error, vs. Lucinda M. Dunn, adm'x of John C. Dunn, dec'd. Ohio, 1st judicial district, Hamilton County. Filed 16th August, 1872.

Supreme Court of the United States.

December Term, 1873.

The Home Life Insurance Company of Brooklyn, New York,
Plaintiff in Error.

Vs.

L. M. DUNN, Administratrix of John C. Dunn, deceased.
Defendant in Error.

No. 192.

In Error to the First Judicial District Court. Hamilton County, Ohio.

BRIEF BY

McGuffey, Morrill & Strunk, and Hoadly & Johnson,
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

The Home Life Insurance Company of Brooklyn, New York,
Plaintiff in Error.

Vs.

L. M. DUNN, Administratrix of John C. Dunn, deceased.
Defendant in Error.

Supreme Court OF THE United States.

No. 192.

BRIEF FOR PLAINTIFF IN ERROR.

In Error to the First Judicial District Court of Hamilton County, State of Ohio.

Statement.

The Defendant in Error obtained a verdict against the Plaintiff in Error, on a Policy of Insurance, in a trial by jury before one of the Common Pleas Courts of said State.

After judgment, the defendant below demanded and took a new trial, to which it was entitled as a matter of right under the Statutes of said State,

(S. & C. St. of Ohio, p. 1155,) upon giving bond satisfactory to the Court, which was accordingly done.

At the next term of said Court, and before any further proceedings in the cause, the defendant filed a petition for its removal to the United States Circuit Court, under the Act of Congress of March 2nd, 1869. (14 *Vol. U. S. Statutes at Large,* 558.)

The requirements of said Act having been complied with, said Court of Common Pleas ordered the same transferred, as prayed for, and that no further proceedings be had therein in that Court.

The transcript having been filed in said Circuit Court, and the cause docketed within the time prescribed, the plaintiff below appeared and moved to dismiss the same for want of jurisdiction, which motion, upon hearing and consideration, was overruled by the Hon. N. H. Swayne of this Court, and an order made accordingly, which is still unreversed.

Thereafter said plaintiff below, by her attorneys, moved for leave to file an amended petition in the cause, which motion was granted by said Circuit Court, and such petition was filed and is now pending in said Court.

Thereupon the plaintiff below filed a petition in error in the District Court of said County, to reverse the order of removal to said Circuit Court.

And, upon hearing, such order was reversed.

The defendant, plaintiff in error herein, then made application to the Supreme Court of said State, in accordance with the Statutes in such cases provided, (*S. & C. Sts. of Ohio*, p. 1101,) for leave to file petition in error to reverse the order of said District Court, which was refused, said Supreme Court, thereby, in effect, affirming said District Court order. *See Record p. 6*, also case of *Home Life Ins. Co.* vs. *L. M. Dunn, Administratrix, etc., 20 O. S. R., 175.*

A second trial upon the merits was then had, in said Common Pleas Court, resulting in a verdict and judgment thereon for the defendant in error herein, which judgment said District Court, after hearing upon petition in error, refused to disturb, but, on the contrary, affirmed the same.

Upon petition averring these facts, a writ of error was granted, by one of the Justices of this Court, to said District Court, directing the records and proceedings in said cause to be certified to this Court, which was accordingly done, and the plaint-

iff in error seeks, herein, to reverse said District Court order, claiming that the decision calls in question the construction of said Statute of the United States, and is against the right and privilege secured to such plaintiff thereunder.

Assignment of Errors.

The errors complained of are:

1st. The reversal by said District Court of said order of removal.

2nd. The subsequent judgment in the Court of Common Pleas after the jurisdiction of that Court had been ousted by the removal.

3rd. The affirmance of said judgment by the District Court.

ARGUMENT.

We claim:

1st. That, upon the removal of the cause to the Federal Courts, the question of jurisdiction was, thereafter, exclusively, within the cognizance of such Courts, and every step in the State Courts subsequently, was *coram non judice.*

2nd. Defendant in error, having appeared in said Circuit Court, and submitted to its decision

upon the motion to dismiss, and, upon leave, having filed her amended petition, was estopped from prosecuting the case further in the State Courts, at least, she was so estopped touching the question of removal, until its final determination in the Federal Courts.

3rd. The cause was properly removed under the authority of the Act in question.

I.

1. If the cause was properly removed, it will be conceded that it was the duty of the State Court "to proceed no further in the cause;" that any step, subsequently taken, in the exercise of jurisdiction in the case by the Common Pleas or District Court, was *coram non judice*, and, therefore, erroneous. *Stevens & Dwight* v. *Phœnix Ins. Co.*, *41 N. Y., 149. Gordon* v. *Longest, 16 Pet. 97. Kanouse* v. *Martin, 14 How. 33. Same* v. *Same, 15 How., 198.*

By authority of *Gordon* v. *Longest*, where a party is entitled to removal, the jurisdiction of the State Court is divested, by the proper application therefor, not only touching the merits of the case, but, as regards the question of removal.

The doctrine of this case would seem broad enough to make the Circuit Court the proper appellate Court from every order, touching an application for removal under the federal statute, whether granted or refused, and whether such order was correct or erroneous.

In case of refusal, it would seem that the applicant might produce certified copies of the papers, filed in the application, and proceed in the Circuit Court as if removal had been effected, invoking the aid of that Court to restrain the State Courts, until the question of the right of removal is determined.

It has been held that where an order of removal has been made by the State Court and the Clerk thereof refuses to certify the record to the Federal Court, pending an appeal from such order, the latter might allow the case to proceed on copies supplied by affidavit. *Ackerly* v. *Villas, 61 Abb. U. S. Cir. Ct. R., 284.*

2. But what we urge is, that, after the removal has been effected, it is beyond the power of the State Court to reinstate the case. The remedy is by motion in the Circuit Court and thence, by writ of error or appeal, to this Court. And hence in

such cases, all subsequent proceedings in the State Court, whether its removal was right or wrong, before the final determination of this question by the Federal Courts, are erroneous.

It has been decided by this Court that, an order of an inferior Court, whereby it undertakes to divest itself of jurisdiction, is subject to review here, on appeal. *Mayor* v. *Cooper, 6 Wal. 247; 22 How., 48.*

It follows, that the order in question of the Circuit Court overruling the motion to dismiss, was so reviewable. Why, then, should not the defendant in error have come directly here by appeal from that Court?

We had succeeded in bringing the question of right of removal within the jurisdiction of that Court; Mrs. Dunn had appeared there and secured a decision on that question. What right had she to lead us through a maze of State Courts, up to this, against our protest?

3. If it be said, it was optional on the part of the defendant in error herein, after the transfer, to pursue this question either in the State or Federal Courts, this we deny.

By reference to the provision of the Federal

Constitution, touching the judicial power of the United States, we find, that, as construed in *Martin* v. *Hunter, 1 Wheat. 304,* it enumerates two classes of cases between which there seems to be a distinction. The one embraces questions arising under the Constitution, laws and treaties of the United States, *to all cases* of which such power is expressly extended. The other relates to controversies between citizens of different States, having reference to the parties rather than the subject matter. In extending judicial power over these the word *all* is omitted, "as if *ex-industria,*" say the Court.

From this it is inferred, that judicial cognizance over the latter class may be vested in the State or national tribunals, at the discretion of Congress, while, over all cases of the former class, original or appellate jurisdiction must be vested in the federal tribunals.

In short, the doctrine is, that over the former, the Federal Courts have, practically, exclusive final jurisdiction under the Constitution, while with respect to the latter, Congress can vest jurisdiction thereover in the Federal or State tribunals, and provide that, having once attached in the latter, it

shall continue, or, on the other hand, that after it has attached, it may be divested by removal or appeal to the former.

That it is competent for Congress, in these cases, to withhold any such right of transfer or appeal to the Federal Courts, but not so as to a case, like this before us, involving the construction of a federal statute, and which, as we have seen, is essentially a question for the federal Courts, under the Constitution.

It follows, then, that all laws touching the jurisdiction of the Federal Courts should be construed liberally in favor of giving them exclusive jurisdiction over such questions as this.

4. Passing to the Act, in question, of 1867, it declares that upon application for removal, and fulfilling the requirements of the Act, "it shall be the duty of the State Court to accept the surety and proceed no further in the suit." Now, it may be, that if the State Court, in the exercise of its judicial discretion, refuse the application, the question of the right to so refuse is reviewable in a higher Court of the State.

For, possibly, as yet no jurisdiction in such case has attached in the Federal Courts. But not so

if the application is granted. In that case, if the transfer is actually made, the jurisdiction of the Federal Courts at once *attaches*, and exclusively so, we insist, for determining the question of right of removal.

It is in the nature of an appeal upon that question. If the adverse party chooses to raise it, and the decision is in his favor, the case goes back to the State Court on its merits; if against him, he has his right of review in this Court.

Especially is this so where the main question is, as here, one determinable finally, by the Federal Courts, under the express provision of the Constitution.

Moreover, a subsequent clause of this Act confirms this view, by declaring: "and the said copies being entered, as aforesaid, in such Court of the United States, the suit shall then proceed in the same manner as if it had been brought there by original process."

It can hardly be contended, that when a suit is brought there by original process, that Court would not have exclusive jurisdiction in determining the question of its own jurisdiction, over such suit under a Federal Statute.

5. It is idle to say that there was concurrent jurisdiction in the two classes of Courts, State and National, to determine a question, which, under the Constitution, must finally be settled by the latter.

Especially when the case involving the question has gone from one of the former to the latter by a proceeding essentially an appeal.

That such it is, appears from the case of ***Martin*** v. ***Hunter,*** before cited, where it is said "the power of removal is always deemed an exercise of appellate, and not original jurisdiction." "It presupposes an exercise of original jurisdiction to have attached elsewhere."

In the case of ***Ackerly*** v. ***Vilas, 1 Abb. United States Circuit Court R., p. 284,*** arising in a United States Circuit Court, on motion to be allowed to file copies of the record of a case ordered to be removed by the State Court, such order having been appealed from, the Court say: "after a State Court has made an order, under the Act of Congress, for the removal of a cause to the United States Court, any further proceedings in the State Court, or in any other State Court, by appeal or other process, are void."

This view was strenuously combated, by the State Court in the same case, on appeal, reported in *24 Wis. 167.*

Referring to the case of *Kanouse* v. *Martin, 15 How., 198,* where this Court reversed the order of a State Court refusing an application for removal, it is urged by the Wisconsin Court, that this was done, not on the ground that the State Court erred in taking jurisdiction of the appeal, but in neglecting to reverse the judgment of the State Court, below, refusing the application for removal.

This may be true, but no order of removal had there been made. The jurisdiction of the Federal Court had not attached.

So, in the case of *Hadley* v. *Dunlap, 10 O. S. 1,* the application had been overruled, and it was held that, though improperly refused, yet, such error did not affect the jurisdiction of the Court, so as to render its further judgment void, and that, therefore, they, the appellate Court, might entertain the case for the purpose of certifying it to the Federal Courts.

Referring to the case of *Gordon* v. *Longert, 16 Pet., 97,* it is suggested by the Ohio Court that this can not be understood to apply to a case "where a State Court erroneously declines to cer-

tify a cause, and proceeds to trial and final judgment thereon;" * * "so as to make such judgment absolutely void for want of jurisdiction, for in that event, the District Court should have stricken the case from its docket." "Such an order would not only nullify the judgment of the State Court, but also prevent the case from being certified to the Court having jurisdiction, and thus greatly embarrass the parties."

Here, then, we see the reason of the continued jurisdiction of the State Court.

But, how manifest that no such embarrassment arises when the application has been granted?

And, again, say this Court: "full jurisdiction having once attached, must be held to continue until the case is disposed of, either by *certificate* or final judgment;" thus admitting that granting the certificate, ousts the jurisdiction of the State Court.

Again, it is said, that "without any positive provision of any Act of Congress to that effect, it has long been established that when the jurisdiction of a Court of the United States has once attached, no subsequent change in the condition of the parties would oust it." *Morgan* v. *Morgan, 12 Wheat., 290. Clarke* v. *Mathewson, 12 Pet., 165.*

So must it be, we urge, when its jurisdiction attaches in a case involving a question of which the Federal Courts are the final judge.

6. Still further, the decision of the Circuit Court in the case at bar, rendered the question of removal *res adjudicata.*

When the State District Court undertook to pass upon this question, it had already been decided by a Court having jurisdiction, and, at a time, when it was not before any other Court. When it came before another Court, we plead this decision. How, then, could such other Court go on? Our plea was as complete a defense to the petition in error in the District Court, as is a judgment by one Court, a bar to a suit for the same thing in another Court of concurrent jurisdiction.

For, it must, at least, be conceded, that the Circuit Court, at the time it passed upon this question, had concurrent jurisdiction with the State Court thereover.

It is settled that "the judgment of a Court of concurrent jurisdiction directly upon the point, is as a plea a bar, or as evidence, conclusive between the same parties, upon the same matter directly in question in another Court."

Why, then, was not this plea of *res adjudicata* conclusive?

We insist, that, being in the Federal Court, we were not required to remain in the State Court, to follow the case through the District, to the Supreme Court, and thence here.

There could not be imposed upon us any such onerous necessity.

This would render the State Courts superior to the Federal.

This would, practically, obliterate all laws, processes and proceedings touching the matter of removal, and substitute in their place, the writ of error, as the sole method of getting from the State to the Federal Courts.

It cannot be that a decision of the Circuit Court, in a case certified to it, upholding its own jurisdiction, does not, for the time being, suspend jurisdiction over that question in the State Courts.

Especially when the subject matter of the decision raises a question of which the Federal Courts must have final jurisdiction; for, as said by C. J. Marshall in *Osborn* v. *Bank of N. Y., 9 Wheat., 19*, a distinction is to be observed "between cases where the character of the parties is every-

thing, and the nature of the suit is nothing, and those in which the nature of the suit is everything and the character of the parties nothing."

II.

By appearing in the Federal Court, in the manner shown, defendant in error was estopped from raising, elsewhere, the question of right of removal.

I. It may be said "that appearance in theUnited States Court could not vest that Court with jurisdiction, because consent can not give that Court a jurisdiction not vested in it by law."

True, but in the case at bar, the Federal Court had jurisdiction over the question of removal, the case being there on certificate. At most, the State District Court had only concurrent jurisdiction with it over the same matter, choosing the one, might well constitute a waiver of all right to appear in the other.

As we have seen, the general jurisdiction of the Federal Courts is expressly extended to the class of question here involved.

But, further, we have shown that the removal of a cause is the exercise of appellate, and not original jurisdiction.

Martin v. *Hunter, 1 Wheat. 349.* It is said there, that "the power of removal is certainly not, in strictness of language, an exercise of original jurisdiction; it pre-supposes an exercise of original jurisdiction to have attached elsewhere."

This removal, then, being the exercise of appellate jurisdiction, and the State Court having concurrent original jurisdiction with the Federal Court over the suit, and after removal, having at most, concurrent jurisdiction on the question of right of removal, and the jurisdiction of the latter having attached by actual removal, surely defendant in error might waive her right to proceed in the one or the other, either by neglect or positive agreement.

It is established that "a party can waive a legal right to pursue a remedy in a particular Court when he has a remedy full and complete in another Court which has jurisdiction." *Highway* v. *Pendleton, 15 O., 753.*

And a party against whom an error has been committed in the rendition of a judgment, may release that error, and thus preclude himself from taking advantage of it. *Wilcox* v. *May, 19 O. 410.*

Under the Federal Statute of 1833, regulating

removals from the State to the Circuit Court of the United States, requiring the party desiring to avail himself of it, to appear for that purpose, alone, in the first instance, it has frequently been held, that by appearing for any other purpose, the party waived the right of removal.

On the same principle, we insist that the defendant in error, by appearing in the Federal Court, waived the right of proceeding further in the State Courts, at least until the question of this right of removal, on which she invited and secured a decision in the Federal Court, was finally settled there.

In *Harrington* v. *Heath*, *15 O.*, *487*, a case appealed from a magistrate, who, it appeared, had no jurisdiction thereover, it was held that, the appellee having filed his declaration in the Court of Common Pleas, which had jurisdiction of the subject matter of the complaint, the defendant, by pleading to the issue, was estopped from denying he was in Court.

It was said: "the object of process being to obtain jurisdiction of the person, if by plea, he admits jurisdiction, and submits thereto, the Court having rightfully jurisdiction of the subject matter, he shall not be permitted, after costs have

accumulated by his own act, and the Court, upon his plea, have proceeded to take cognizance of the case, to deny jurisdiction, and withdraw himself from the control of the Court."

In the analogous case of *Bisher* v. *Richards, 9 O. S., 497,* the Court say: "the case was one of which the Court of Common Pleas would have had original jurisdiction. It was brought by the plaintiff in error into that Court by appeal. He must be regarded as having waived his right to object to the jurisdiction, by failure to object, and proceeding to trial on the merits. He can not be allowed thus to speculate on the chances of a favorable verdict, and then turn around and deny the jurisdiction of the tribunal, to the decision of which he has submitted his case. It was consistent for that tribunal to assume jurisdiction by the consent of the parties, and the parties must be understood as having given such consent."

So, we say, of the case in hand.

2. And, further, as Mrs. Dunn was a citizen of Ohio, and the Home Life Insurance Company was a citizen of New York, the filing of the amended petition by her, in the Circuit Court, was, whether the order of removal was proper or not, the com-

mencement of a suit, in which that Court had jurisdiction, both of the parties and subject matter. If any fault could be found with the institution of this action, it could be only by the Company. It does not lie in the mouth of Mrs. Dunn, who filed this amended petition, to say it was not rightly filed against a Company incorporated by another State.

Again, the question of removal was a proper one for the Circuit Court to pass upon, and whether the removal to that Court was proper or not, it having been made, and the question of its legality there raised, defendant in error was estopped from raising it elsewhere, until finally disposed of there.

It can not be said, that the same principle of estoppel would apply to us by appearing further in the State Court, for we appeared there under protest. We plead that which, we insist, was a bar to further proceedings there, whether the case was properly removed or not, and hence, in either case, all subsequent proceedings were *coram non judice.*

3. But, still, again, our defense in the State Court amounted, as we have said, to a plea of *res adjudicata* as to the question of removal; if not, then, to the pendency of the same case, both on this

question and on the merits, in another Court of competent jurisdiction.

For, the parties to the suit made it a proper one for the Circuit Court, if properly commenced there, or properly removed thither. The question of removal was one proper for that Court. The defendant in error had procured a decision upon the question of removal, at a time when the case was not before the State Court. Her motion to dismiss was made May 5th, 1869, and overruled May 13th of said year. The petition in the District Court, to reverse the Common Pleas order of removal, was filed April, 1870. *Vide Record, p. 20.*

At this time then, the question was *res adjudicata* by a Court competent to pass upon it, having, at least, concurrent jurisdiction with the State Court in the premises, and therefore, it was not competent to raise it by writ of error in the District Court, but by appeal only to this Court.

4. Still, further, it is, in general, a good cause of abatement of an action, that another action is then pending, for the same matter, in another Court.

James v. *Dowell, 7 Smeades & M., 333.* True, "the pending of an action in a foreign tribunal, although of competent jurisdiction, is not a good cause of abatement."

Story's Conflict of Laws, 610 a. "But the Circuit Court of the United States, in the application of this doctrine, is not foreign to the State Courts."

Smith v. *The A. M. F. Ins. Co., 2 Foster, 21,* "Especially," it is here said, "where a party has his election to pursue his remedy in the Courts of the State, or resort to the concurrent jurisdiction of the Circuit Court, it applies in all its force."

How then could the defendant avoid choosing between the two tribunals on the question of removal, and having chosen the Federal, how could she return to the State tribunals until so ordered?

III.

The cause was properly removed under the Statute in question.

1. The question of the correctness of this proposition is supposed to depend upon the construction given to the phrase "before final hearing or trial," as used in the Act of 1867. On the one hand, it is claimed that it should be construed to authorize the removal at any time before "*final trial.*" On the other, that it does not justify a removal after "*a trial.*'

There has been but little authoritative construing of the phrase.

In the case of *Ackerly* v. *Vilas*, before cited, the case had been twice before the Circuit Court of the State, and a second time remanded on appeal, by the Supreme Court, when the application for removal was made.

Says the United States Circuit Judge: "If the case had been finally determined by either judgment of the Circuit Court, or by order of the Supreme Court, then the application for removal would not have been filed before "the final hearing or trial," but the last order of the Supreme Court, reversing the judgment of the Circuit, and remanding the cause to that Court for further proceedings, according to law, opened the whole case to litigation, the same as if no judgment had ever been rendered. The Supreme Court, in effect, ordered a *veniri facias de novo*, which required the Circuit Court to hear the cause as if no hearing or trial had taken place."

"The whole proceedings were *in fieri* when the petition for removal was presented to the Circuit Court, I am, therefore, of the opinion that the petition was presented before the final hearing or trial of the cause."

It appears from this that the Circuit Judge construed the phrase in question, the same as if it read "*before final hearing or final trial.*"

This view is vigorously contested in the same case, reported in *24 Wis., 165*, and in the case at bar, reported in the *20 O. S., 175*, and also in that of *Hall & Long* v. *Rickets, Kentucky Court of Appeals, Winter Term, 1872.*

The two last substantially follow the reasoning of the first, without much apparent examination, and, therefore, add little additional weight.

This first case proceeds upon two grounds:

1st. That the words "before the final hearing or trial," are to be understood as though they were "before trial or final hearing."

2nd. That in the case then under consideration, certian issues of law had been *finally* decided by the highest Court of the State, and that such decision had become the law of the case, and binding upon the Court below, and that, therefore, there had been in a sense, a *final hearing* or *final trial.*

As to the first ground, we deny the construction urged, and insist that the adjective *final* qualifies the substantive *trial,* as well as the word hearing. The rule, in cases where an adjective is followed

by several substantives in succession to each of which it may appropriately apply, is, that it agrees with all.

There is nothing in the phrase or context here, to indicate any other construction. If we go outside the letter of the Act, we discover no contrary indication.

Acts in *pari materia*, which it is permissable to examine, point to the construction which we urge.

The Act of 1789, (*14 Vol. U. S. St. at Large, 79,*) provides for removal by defendant aliens, or citizens of another State "at the time of entering their appearance in such State Court."

The Act of 1866, (*14 Vol. U. S. St. at Large, 306,*) provides for removals by same classes of litigants "at any time before the trial or final hearing."

The Act in question, of 1867, embraces residents of other States, whether *plaintiff* or *defendant*, and authorizes the removal "at any time before final hearing or trial," upon affidavit, that he has reason to, and does believe, that from prejudice or local influence, he will not be able to obtain justice.

We see here a gradual extension of the privilege of removal as to parties, and as to time, and grounds of removal.

First, it was limited to *defendants*, and they must apply at the time of their first appearance. Next, they might apply any time before a "trial or final hearing."

And now, it extends to plaintiffs as well as defendants, whenever local prejudice is shown, and why not to the time of *final trial?*

The Court, in the Ohio case cited, adopting the idea advanced by the Wisconsin case, suggests that there can be no doubt that the transposition of the words in the Act of 1866, so that in that of 1867 they read: "before final hearing or trial," instead of "before trial or final hearing," was merely accidental; and this suggestion is repeated in the Kentucky case. But, manifestly, there is no force in this, or the consequent supposition that the words should be assigned the same meaning in both Acts.

The natural inference is just the reverse.

If the transposition makes the words susceptible of a different meaning, the inference is that this was done for a purpose, especially since the second Act extends the privilege beyond the former, both with respect to parties and grounds of removal.

Why attribute to accident what may be ac-

counted for on the theory of intelligent purpose?

As was said by Justice Story of this Court, in *Martin* v. *Hunter*, under similar circumstances: "from this difference of phraseology, a different intention may, with propriety, be inferred." "It is hardly to be supposed that the variation in language could be accidental. It must have been the result of some determinable reason; and it is not very difficult to find a reason, to support the apparent change of intention."

The grounds of removal under this Act, are such as may well not be disooverable, until after a trial.

In the Act of 1866, the grounds of removal rest upon the presumption of law, that a resident of another State can not get justice in a State Court.

In this Act they rest upon actual facts proven by *ex-parte* testimony.

Why, then, say that the limit of the right of removal, as to time, is the same in both?

The words "the final hearing or trial," even, if it were admitted that the adjective "final" does not qualify the noun "trial," do not require the conclusion reached by the Ohio Courts. For there had been no "trial" of this case in the sense of

the Statute, when it was removed. "The trial" was afterwards. How can a trial, all the effect of which was set aside by bond given by us, be called "*the* trial?" "*The* trial" of a case, is the step in its proceedings at which it is disposed of and ended, so far, at least, as the Court is concerned, in which it is then pending. "*A trial*" is defined by the Ohio Civil Code, Sec. 262, to be "a judicial examination of the issues, whether of law or fact, in an action;" and "*the* trial" must necessarily be such examination ending in judgment, and not ending in a second trial, or *venire facias de novo.*

2. But, finally, there is an important distinction between the case at bar and those referred to (excepting the Ohio case,) wherein this Act was under consideration.

Here the application was made after a second trial was taken as a matter of right under the Ohio Statute. *S. & C., St. of O, pp. 1155 and 1159.*

This Statute secures this right of second trial when "either party has the right, by law, to demand a trial by jury, and in which an issue of fact has been joined between the parties."

The Statute operates the same as though a motion for a new trial had been allowed.

It regards nothing as settled by the first trial.

It leaves the whole case to be tried again, precisely as if no hearing or trial had taken place.

It ignores the former finding of facts by a jury, submitting the case, *de novo*, to another jury, untrammelled by the ruling at the former trial.

It has no application, as we have seen, to cases other than those triable by jury.

That, before us, then, would seem to be just the case designed to be reached by the Act of 1867.

The local prejudice, from which it seeks to provide, is more likely to be manifested in a jury than a Court, and yet not likely to be discovered until after a single trial by jury.

Again, it is very unlike the case of an appeal, for there the case is, to a certain extent, finally determined in the inferior Court.

For the time, it is *res adjudicata* there. And so, when sought to be removed after it is sent back by an appellate Court.

The latter has established the law of the case, upon the point involved in the appeal, which becomes a binding rule in the premises, upon the subordinate Court.

Much stress was laid upon this point in the Wisconsin case, in the State Court.

Say the Court: "It seems clear, therefore, that whenever, in any State Court, there has been a trial in an action at law, or a final hearing in an action in equity, *the result of which was an adjudication, which, upon the principle governing judicial decisions, would be final between the parties, or to any position of the merits of the action*, the case has passed beyond the stage where it was within either the letter or the spirit of the law." And, again, on page 172: "It is material, then, to consider what was the effect of the several decisions of this Court with respect to the rights of the parties as to the matters involved in them.

No doctrine is better settled here, than that the matters decided become *res adjudicata;* these decisions, (referring to the two decisions by the appellate Court, before the application for removal,) became the law of the case, binding upon the parties, binding on the subordinate Court, and disposing, finally, of the question decided, whatever further proceedings might be necessary to the ultimate disposition of the case, those questions were no longer open."

And on page 179, the Court seem to base their dissent from the holding of the U. S. Judge, on the ground, that the latter erred in assuming that when the cause was a second time remanded by the appellate Court, "the whole case was opened to litigation, as if no judgment had ever been rendered." It denies that "after a cause has been three times in that Court, twice from appeal from final judgment, after the essential legal questions, upon the decisions of which it depends, have been solemnly adjudicated by this Court, and the cause remanded to the Circuit, it starts there anew, with nothing settled."

So in the case decided by the *Kentucky Court of Appeals*. The removal was attempted after the cause had been remanded, by the appellate Court, for a new trial.

The former trial seems to have been held final within the meaning of the Act of 1867, on the ground that the decision of the appellate Court, remanding the case for a new trial, "based on the former trial of the case, as to questions of law, involved by and decided upon, became the law of the case, as finally disposing of these questions, and binding, not only on the inferior Court, but

also upon the appellate Court, upon another appeal in the same case."

But this is not the case here. For it is very clear that at a second trial, under the Ohio Statute, the whole case is "opened to litigation, as if no judgment had ever been rendered."

No question of law or fact has been finally settled in such case, as we have seen. No previous finding of the one or the other, is to have any binding force in their determination at such second trial.

Whatever, then, may be said of the *dicta* contained in these two cases, the Court, in both, base their decision upon a principle which clearly distinguish them from that at bar, and render them of very little weight in determining the latter. And the case in the *20 O. S.* loses much of its force by failing to observe this distinction.

We think it clear, then, that the case under consideration comes within the spirit and letter of the law in question.

To recapitulate, we claim:

First. The cause, having been certified to the Circuit Court, the question of the legality of its removal was within the exclusive jurisdiction of that Court.

Second. The defendant in error, having appeared there in the manner shown, she was estopped thereby, from raising the question of removal in the State Court, and therefore all subsequent proceedings in the latter are void.

Thirdly. The case was properly removed under the Act of 1867, and hence the order of the Hamilton County District Court, holding otherwise, and the subsequent judgments in the case should be reversed.

These propositions we urge with confidence.

We submit that there is a tendency, on the part of State Courts, to hold on to jurisdiction in cases of this class, with unreasonable tenacity.

The Federal Constitution and laws have presumed, whether rightly or wrongly, it is not for us here to inquire, that local or State attachments, prejudices, jealousies and interests, under certain circumstances, interfere with the regular and proper administration of justice in the State Courts, and hence these provisions for the removal of causes to the national tribunals.

There are cases where the State tribunals merit rebuke for the blind persistency with which they

attempt to thwart the obvious meaning and intent of these provisions.

And we submit that this is one in which such rebuke should be administered, by reversing the orders complained of, and which, we urge, were much under an assumed jurisdiction, asserted by such tribunals, in plain violation of the Statute in question.

H. A. MORRILL,
GEO. HOADLY,
E. M. JOHNSON.

Attorneys for Plaintiff in Error.

Robert Clarke & Co., Prs., 65 West Fourth St., Cincinnati, Ohio. [*Jan.* 1874.

Supreme Court of the United States.

The Home Life Insurance Company of Brooklyn, New York,

Plaintiff in Error,

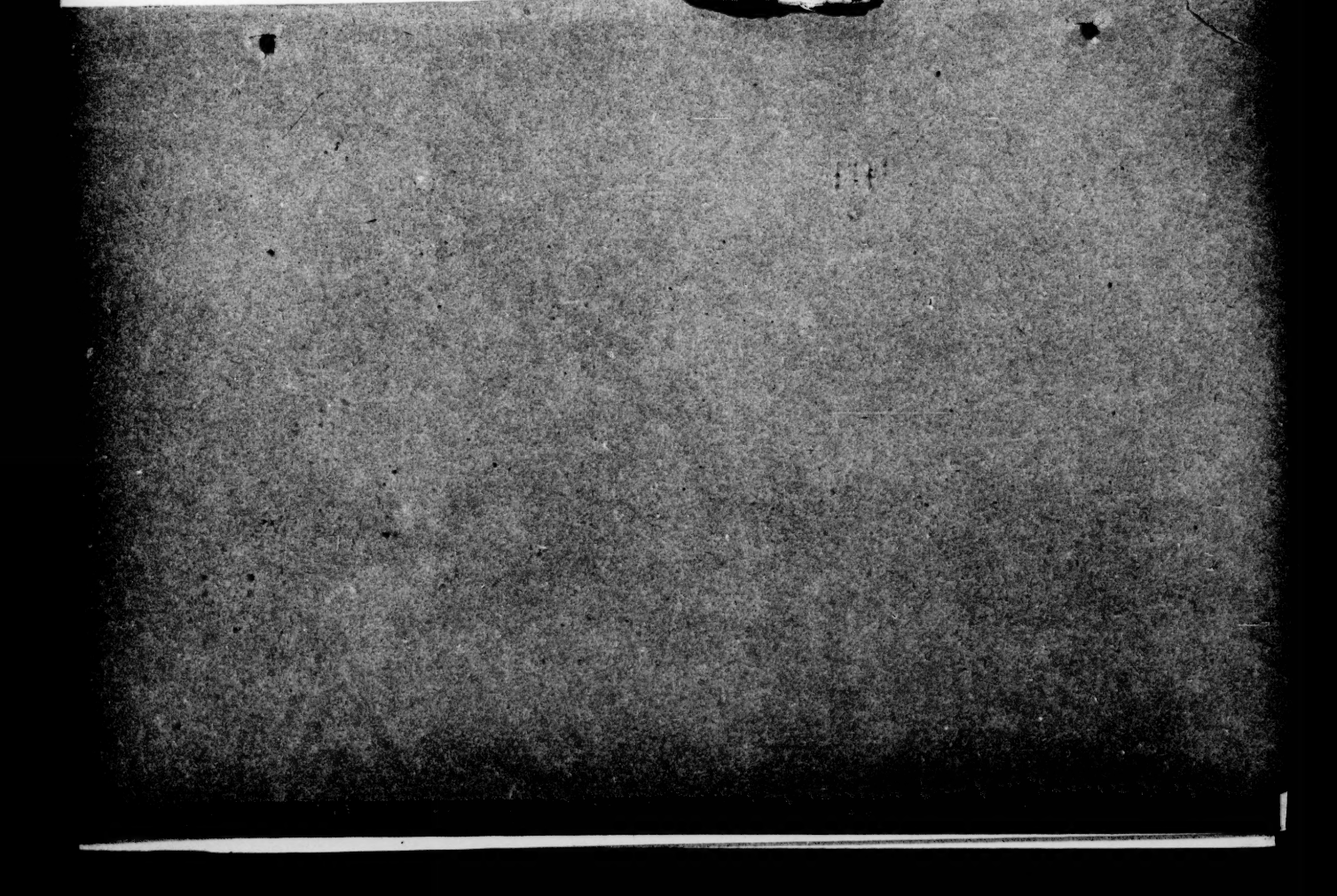
vs.

Lucinda M. Dunn, Administratrix of John C. Dunn, deceased,

Defendant in Error.

Reply to Brief for Defendant in Error.

HENRY A. MORRILL,
HOADLY & JOHNSON,
Counsel for Plaintiff in Error.



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Reply to Brief for Defendant in Error.

HENRY A. MORRILL,
HOADLY & JOHNSON,
Counsel for Plaintiff in Error.

We desire to submit some observations upon the brief which has been printed by counsel for defendants in error. Before doing so, however, we ask the attention of the Court to two cases, not before cited by us, in support of the views presented in our original brief.

In *Dart & Osborn* v. *McKinney*, 9 Blatchf. 359, judgment had been rendered in a State court, upon the report of a referee, against the defendants, which was reversed, and a new trial ordered. In this state of the

case, the State court ordered the cause removed to the Federal tribunal under the act of July 27, 1866 (14 Stat. at Large, 306). A motion was then made to Judge Blatchford that the cause be remanded to the State court, which he overruled, holding that "*the* trial" had not yet been had.

In *Johnson* v. *Monell*, 1 Woolw. 390, a similar question, arising under the act of March 2, 1867 (14 Stat. at Large, 558), was presented to Mr. Justice Miller, sitting in the Circuit Court in Nebraska.

The action was originally brought by Johnson, then a citizen of Iowa, against Monell, a citizen of New York, in one of the courts of the State of Nebraska. It was there tried, and verdict rendered for plaintiff, which was set aside on motion made by the defendant. The plaintiff had removed into, and become a citizen of Nebraska, before the trial. After the new trial had been granted, he again changed his residence to Iowa, and then filed his petition for removal into the Federal court, which the State court granted, and the cause was docketed in the Circuit Court of the United States for the District of Nebraska. A motion was there presented to Mr. Justice Miller to remand the cause to the State court, but after very full consideration overruled.

See also *Sneed* v. *Brownlow*, 4 Coldw. 253, 256.

Mr. Standish has, no doubt inadvertently, fallen into an error in the second sentence of his brief, or of

what he calls the preface thereto. He says we have "left out of the record what occurred in the Supreme Court of Ohio."

If the Court will refer to page 1 of the record, the following passage may be read: "Wherefore the plaintiff in error made a motion in the Supreme Court of the State of Ohio, the highest court in the State, for leave to file a petition in error to reverse said order of the District Court aforesaid, which motion was overruled and leave refused."

As the District Court for Hamilton County is the highest court to which we had a *right* to take this case, this averment was unnecessary. Nevertheless we did not "leave it out of the record," and nothing remains to be supplied by him. Petitions in error (the only mode of appellate review known in the Supreme Court of Ohio) are not filed as of course, but by leave only.

The difficulty in this case has grown out of the abolition, in Ohio, of the distinction between law and equity. Reference to Mrs. Dunn's original petition (Record, 8) discloses that before the fusion of law and equity, this would have been an equity cause, and her petition a bill in chancery. She asserted no legal, but a purely equitable claim, viz., to reform a policy of insurance, and for judgment after reformation, and general relief.

Issues were framed (Ib. 14), consisting of four questions, and submitted to trial by jury, who returned

specific answers (Ib. 15), just as in chancery might have happened before the code.

Because under the laws of Ohio, as expounded by the Supreme Court in the case cited by Mr. Standish, this was held to be a case triable by jury, and in which the remedy of second trial is given by statute, it does not follow that it was a "suit at common law" within the seventh amendment to the constitution. The State of Ohio can not, by giving jury trials in chancery cases, extend the operation of this amendment. It certainly never was intended to apply to the practice, familiar in courts of equity, of framing issues for trial by jury, in aid of the Chancellor's conscience, or to prevent the Chancellor from decreeing according to his own best judgment, notwithstanding verdict.

As there has been no *final hearing* in this case, we see no reason to doubt the right of removal, growing out of the seventh amendment. Mr. Standish makes no question of the propriety of the order granting a second trial, and it is now too late to doubt it successfully, the three years allowed by the Ohio code for writs of error having elapsed since the date of that order.

If, however, this were "a suit at common law," still less would the seventh amendment apply to our prejudice. For, under that amendment, the defendant in error will be entitled to trial by jury in the Circuit Court. She can not escape the dilemma: this is either a suit at common law or in equity. If the former, she is

in no danger of losing her trial by jury; if the latter, she has not and never had such right under the constitution of the United States.

If this were a suit at common law, "*the* trial" is yet to be had; if a suit in equity, the "*final* hearing" lies *in futuro*.

We know of nothing in the acts of 1866 or 1867, under which this cause was removed, to impair the plaintiff's rights upon the second trial bond. If the cause were one in which the right to remove existed, then the sureties upon such bond are still held. As well might it be objected that a cause wherein any of the provisional remedies had been had, could not be removed. In each of these, the bond in form secures only the remedy to be had in the same court; but as the right to remove exists by law, the injunction or replevin bond, or bond given to discharge an attachment, is subject to it, and the condition of the bond applies to the Court into, as well as that from which the cause may be removed. The provision of the act of 1866, referred to by Mr. Standish, relative to special bail bonds, is inapplicable. The special bail bond before given is superseded, because a new bond is expressly required, and the bail is "discharged," because the bond upon removal is conditioned, among other things, for the "appearing and entering special bail in the cause, if special bail was originally requisite therein." (14 Stat. at Large, 307.) The language of both acts is designed

to save all rights like this, and seems to us sufficient for that purpose.

As to the claim, that because the plaintiff in error resisted the effort to obtain judgment after the removal, and thus gave jurisdistion to the Ohio courts, it is entirely answered by the cases of *Kanouse* v. *Martin*, 14 How. 33; 15 Ib. 198; and *Stevens & Dwight* v. *Phœnix Ins. Co.*, 41 N. Y. 149.

H. A. MORRILL,
GEO. HOADLY,
EDGAR M. JOHNSON,
Of Counsel for Plaintiff in Error.

CINCINNATI, *January* 3, 1874.

Supreme Court of the U. S.

OCTOBER TERM, 1873.

THE HOME LIFE INSURANCE COMPANY OF BROOKLYN, N. Y.

Plaintiff in Error.

vs.

LUCINDA M. DUNN, Administratrix of John C. Dunn, deceased.

Defendant.

W. H. STANDISH,

Attorney for Defendant in Error.

H. WATKIN, PRINT. COR. 5TH & WALNUT.

PREFACE.

After the following brief was in type we received a copy of the printed record in this case. The plaintiff in error has left out of the record what occurred in the Supreme Court of Ohio, which we will supply by motion, so that the court will have the whole case.

As cross relief we ask this court at this hearing to dispose of the question of jurisdiction, for we do not want the plaintiff's petition in error dismissed as being directed to the wrong court, and thus give him the right to come on error here again on the same matter, and put us to still further delay and expense.

So far as the question of estoppel arises, it matters not whether error lies to the District or Supreme Court of Ohio. If to the former the plaintiff in error might have been in this court a year earlier than he was, and over six months before he re-invested the State courts with original jurisdiction, and longer than this before he brought a suit in the District court to conclude us on the merits.

An explanation of the judicial system of Ohio may illustrate the following argument that a second trial in Ohio is the equivalent of an appeal, and not a rehearing in the place of a new trial, or upon the terms of a new trial. All suits for money for less than $100 must be brought before a magistrate. After judgment they can be appealed to the Common Pleas, as a matter of right, by giving notice and furnishing bond, etc. After they get into the Common Pleas Court they can be tried upon the merits, the same as if they had originated there; but after they have once been tried in the Common Pleas Court no appeal or second trial can be taken, but a new trial may be had under the rules of the common law if the court is of opinion that a new trial should be granted. This ends the right to a re-trial upon the merits, though the case can be taken on error to the Supreme Court.

Until 1858, all suits that were originally brought in the Com-

mon Pleas Court could be appealed to the District court upon the same terms as a case brought in the magistrate courts was appealed to the Common Pleas; and after appeal to the District court the case could be re-examined on the merits in the District court, the same as if it had been originally brought there. This is the practice to this day in the District court.

In 1858 the docket of the District court had become too much encumbered, and the legislature cut off that part of the appellate jurisdiction of the District court that covered all jury cases, and provided that the appellate trial should be heard before a jury in the Common Pleas court, provided the party taking the second trial gave the same security and complied with the same conditions that theretofore had been necessary to appeal his case; and that the judgment obtained at the first trial should remain after perfecting a second trial, as a lien on the defeated parties realty, and have the same force and be no more vacated than if the case had been appealed; and that a party taking, or having the right to, a second trial, should not have the right to appeal. The second trial statute and all its amendments are entitled, "An Act to Relieve the District Court," etc. After a second trial a new trial can be had for cause; and so can it be had after appeal. After second trial or appeal the case can be taken on error to the Supreme Court.

This is a full and candid explanation of the whole judicial system of Ohio as respects the above matter, as the court will see by reference to the statutes of Ohio.

Supreme Court of the United States,

DECEMBER TERM, 1873.

THE HOME LIFE INSURANCE COMPANY OF BROOKLYN, N. Y.
Plaintiff in Error,
vs.
LUCINDA M. DUNN, Administratrix of John C. Dunn, deceased,
Defendant.

This suit in error is to reverse a judgment of the Supreme Court of Ohio, rendered about February, 1871, and is reported in 20 O. S. 175. It is to settle the construction of a United States law that arose in the State courts. It is not to reverse a judgment of the District Court, based on the verdict of a jury in in the court below, obtained several months after the above decision of the Supreme Court was rendered, as the court will see hereafter.

These questions arise:—Has a party the right to remove his case from a State Court, into a Circuit Court of the United States by virtue of a State statute, after the right to remove it under the laws of Congress is otherwise closed, and thereby make the laws of Congress subordinate to those of a State, and the Federal courts dependent on State legislation for their jurisdiction?—Also, whether by virtue of a State statute, a case, after it has been tried before a jury, and their verdict affirmed and the right to a new trial exhausted, can be tried over again in the United States Court, and property in the shape of a second trial bond be destroyed without compensation or the process of law?

The State statute under which these rights are claimed is known as the Second Trial Statute of Ohio, which authorizes a second trial in the State court after the right to a new trial has been exhausted, upon the same terms and with the same effect as an appeal, and in the place of an appeal.

The facts of this case are as follows:—It was tried upon the

merits before a jury, their verdict was affirmed and judgment rendered. The court overruled a written motion for a new trial, thus settling that this case had had its last as well as its final trial under the rules of the common law, the only rules embraced in the laws of Congress or the constitution of the United States for the re-trial of any case that has once been tried by a jury. After this, the plaintiff in error, as a matter of right and not of grace, took a second trial, by virtue of this second trial statute, by performing the same conditions that were necessary to appeal his case. At the next term of the court he filed a petition to remove his case into the Circuit Court of the United States, under the law of March 2, 1867, which requires such application to be made before the final trial or hearing of the case. His petition was granted and excepted to—this question was taken to the District Court and the order of removal set aside. The District Court was composed in part of the judge who had ordered the case removed, and he concurred with all the other members of that court in reversing himself, as that court announced in delivering their opinion, and this after lengthy arguments and mature consideration. The same question was then taken to the Supreme Court of Ohio, and that court unanimously affirmed the judgment of the District Court, deciding that a second trial under the second trial statute of Ohio is a proceeding in the nature of an appeal, based upon a final judgment, that is continued in force after the perfection of the right to a second trial, the same as after appeal, and that it is not in any sense a new trial, and is taken as a matter of right, after the right to a new trial is exhausted, where a new trial can not be had; and therefore that according to the Ohio practice this application to remove this case was not until after the final trial and hearing of it, and thus too late to be within the terms of the law of Congress.

The settled construction which the Supreme Court of Ohio gave to this second trial statue of Ohio is as follows:

"In this State, after final decree, equity cases are appealable to the District Court on the appellant giving notice and entering into an undertaking as required by the statute. In cases in which either party has the right to a trial by jury there can be no appeal, but either party, after final judgment, by giving notice of his demand, and entering into an undertaking as required by the statute, is entitled to a second trial. If no undertaking is

given, the demand for a second trial and the notice of appeal go for nothing; and the judgment or decree is conclusive upon the rights of the parties. Such also is the effect of this judgment or decree from the time of its rendition to the giving of the undertaking, and, notwithstanding the appeal or the right to a second trial may be perfected, the lien of the judgment or decree is continued until the determination of the cause on appeal or second trial," 20 O. S., 181.

Immediately following our case is the case of *Evans* vs. *Kimball et al*, 20 O. S, 183. That case had been appealed before the application to remove it was made. The Supreme Court in that case say:—"The principle decided in the case of the *Home Life Insurance Company* vs. *Lucinda M. Dunn*, administratrix, must govern in this case. * * Upon the grounds stated in the opinion in the last case the petition for the removal must be dismissed, and the cause remanded for further proceedings."

The question before the court in our case was, whether this application to remove was before the final trial or hearing of the case, and this depended on whether a second trial in Ohio is in effect a new trial, or equivalent to an appeal requiring a construction of the second trial statute of Ohio to settle it, which the Supreme Court made, and this court must follow, as the following decision shows:

"Were this question now for the first time to be decided, a considerable contrariety of opinion respecting it would prevail in this court; *but it will be unnecessary to discuss it if the point shall appear to be settled in Kentucky.* This court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the courts of the State have given to those laws. This course is founded on the principle supposed to be universally recognized, that the judicial department of every government, when such department exists, is the appropriate organ for construing the acts of that government. Thus no court in the universe which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstandings. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to

depart from that construction than to depart from the words of the statute. On this principle the construction given by this court to the constitution and laws of the United States is received by all as the true construction; and on the same principle the construction given by the several States to the legislative acts of those States is received as true, unless they come in conflict with the constitution, laws, or treaties of the United States. If, then, this question has been settled in Kentucky we must suppose it to be rightly settled."—*Elmendorf* vs. *Taylor*, 10 Wheaton, 160. See also Cooley's Constitutional Limitations 13, and the authorities there cited.

The Supreme Court of Ohio, in settling that a second trial under the Ohio statute is not a new trial, but a proceeding based on a final judgment that is continued in force after second trial is taken, and is in the nature of an appeal, and upon the same terms and in the place of an appeal, were not passing upon any United States law or any provision of the United States constitution; and as it will be conceded that this case could not have been removed if it had been appealed, it must also be conceded that it could not be removed after a second trial was taken—as the one is equivalent to the other as decided by the Supreme Court of Ohio, by which decision this court must abide, as we have shown, because it relates to the construction of an Ohio statute.

This decision settles, as we contend, that this application to remove this case was not until after the final trial or hearing of this case, and therefore was too late.

Lawyers frequently err in their understanding of what a final trial or final judgment means. They often suppose it to be the last trial or the last judgment that can be had in the case, confounding the word final in its legal sense with the word last in its general sense, forgetting that all trials are either final or interlocutory, and that no trial to a jury upon the merits of a case is interlocutory, and therefore is final. Appeals can only be taken from final orders or final judgments; and so it is with second trials, as we have before shown.

It can not be contended, in the face of the two statutes for second trial and appeal, that a second trial possesses less resadjudicata than an appeal. Either remedy may be had when a new trial can not. Second trial was given to save an appeal, and the right to re-examine on appeal such matters as were tried below is

as general and broad as on second trial, as the appeal statute of Ohio shows.

Final judgments can not be had without final trials or final hearings. We can well see how a final trial can be had without a final judgment by neglect to enter it, and still the law of the procedure and forum, and what has been done, show a final trial. The principles of what are final and what are interlocutory trials are explained in Blackstones Commentaries, 3rd vol. 307; 3 Cranch, 179; 2 Peters, 449, and are familiar to the court. The case last cited is that of *Weston et al.* vs. *the City Council of Charleston*, and it enlarges the term final judgment much beyond anything that we have contended for in this case, or that it is necessary for us to claim. A single legal question was raised in the lower State court, where the suit originated, as to the power of a State to tax stock issued for loans made to the United States, all other questions remaining for hearing thereafter in the State court.

The question was raised as to whether the judgment of the court on this one matter was a final judgment, for if it was not the Supreme Court of the United States could not take jurisdiction of the case to determine the question raised. This was the decision of the matter by the Supreme Court of the United States: "The words *final judgment*, in the 25th section of the judiciary act, must be understood in the section under consideration as applying to all judgments and decrees which determine the particular cause, and it is not required that such judgment shall finally decide upon the rights which are litigated that the same be within the purview of this section." This we think will do for an authority in a case where every thing was tried to a jury—their verdict affirmed, and a new trial refused, and a second trial taken, which, according to the terms of the second trial statute, can be based only on a final judgment, that is, continued in force after perfecting the right to a second trial, the same as after perfecting an appeal. In the case in 2 Peters, the hearing in the first court was as final as in the last court; and the hearing in none of the courts became less final by perfecting proceedings for the purpose of reversing them, particularly before the hearing for reversal had taken place; and so it was with reference to taking a second trial in this case.

No lawyer more thoroughly understands this than did his

honor, Judge Swayne, who, at the hearing in the United States Circuit Court to have this case sent back, suggested that if this case had been appealed it could not have been removed, and the error which we claim he there made was in treating a second trial as a proceeding in lieu of a new trial, and not of appeal, as the Supreme Court of Ohio has since settled, which closes all chance for cavil here on this point.

We have before shown that the second trial statute of Ohio gave the second trial in this case, and the right to remove this case under the law of Congress if the right exists. After the right of a Federal court to take jurisdiction of a case has been closed under the laws of Congress, it can not be given by means of State legislation; for the courts of the United States derive their existence and all their jurisdiction from the laws of Congress that are in keeping with the provisions of the constitution, and they can not take jurisdiction in any other way or from any other source even by consent of parties; and their jurisdiction is limited and not general, *Mills* vs. *Brown*, 16 Peters, 525. "The jurisdiction of the courts of the United States is limited, and the inferior courts can exercise it only in cases in which it is conferred by an act of Congress. * * The Circuit Court cannot quash proceedings against a public minister depending in a State court, nor can the court in any way interfere with the jurisdiction of the courts of a State syllabus," 1 Washington Circuit Court Report, 232.

Ohio is the only State that we know of that has a second trial statute. It, therefore, must be conceded that if this application to remove this case had been made in any other State, that it would have been refused; for the law of Congress would have compelled the court to refuse it. If the right in this case existed it was by virtue of State legislation, to which this law of Congress is subordinated, in violation of the 6th article of the constitution, which provides that the constitution and the laws of Congress shall be the supreme law of the land, anything in any State constitution or State law to the contrary notwithstanding.

The construction that is contended for for this act of Congress not only makes it subordinate to the second trial statute of Ohio, but renders its operation in the different States ununiform. In this connection we think the following, from the Supreme Court of Ohio, will be found appropriate:—

"The act of Congress was doubtless intended to have the same operation in all the States, irrespective of the difference that may exist in the modes provided in the several States for examining, in the appellate court, questions decided below. * * It is competent for the legislature to take away the right of appeal and of a second trial. If this were done there would be no ground for the removal of the cause under the act of Congress. The true construction of the act does not, as we think, make its operation depend upon whether the legislature of the State allows or does not allow the exercise of appellate jurisdiction after a common law trial, or a final hearing of a suit in equity in the court of original jurisdiction.

"To bring this case within the act of Congress would be to allow the non-resident party to experiment with the jurisdiction of the State courts. If the trial should result in his favor, it would bind his adversary; but if it should result adversely to him, he could escape the effect of the litigation by removing the cause to another jurisdiction. To lead us to such a conclusion the intention ought to be expressed with irresistible clearness." —20 O. S. 181.

This is more particularly so in Ohio, because a second trial is not a discretionary right, that will be refused if there is no reason for another trial. It is a statutory trial, that robs the court of all discretion, the same as the statute of appeals.

"In the case of *Parsons* vs. *Bedford*, 3 Peters, 435, the Supreme Court of the United States made some law not out of place in this connection. It was contended by counsel that as the practice in Louisiana was different from that of every other State, that a certain law of Congress should have an operation there that did not exist elsewhere. This was the answer of the United States Supreme Court:—"Was it the intention of Congress, by the general language of the act of 1824, to alter the appellate jurisdiction of this court, and to confer on it the power of granting a new trial by the re-examination of the facts tried by the jury, to do that in respect to the courts of the United States sitting in Louisiana which is denied to such courts sitting in all other States in the Union? We think not. * * If, indeed, the construction contended for at the bar were to be given to the act of Congress, *we entertain the most serious doubts whether it would not be unconstitutional.* No court ought, unless

the terms of the act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution."

The rules of construction direct us to ascertain the meaning of the men who made this law of March 2, 1867, by looking to the circumstances which then surrounded them, and the object they had in view. Each of the thirty-seven States had in the Senate an equal voice. In each the common law understanding of final trial, in actual practice, prevailed alike, understood as we have stated; and in no State, save Ohio, was there a second trial statute. Did Congress intend to make this law operate in Ohio differently than in every other State, and give non-resident parties longer to experiment in the courts of Ohio than in the courts of the late rebellious States? This law reads that it is an amendment of that of July 27, 1866, and therefore both must be construed together. The law of 1866 gave only the non-resident defendant the right to remove, and it required him to apply for a removal before any final trial of the case. If the law of March 2, 1867 (which was passed to give a non-resident plaintiff the right to remove) is so construed as to give the non-resident defendant a longer time than he had by the law of 1866, then the law of 1866 is repealed by the law of 1867, and not amended by it as the act of 1867 states.

The following decisions are, that this application to remove this case was too late to be within the terms of the law of March 2, 1867: *Home Life Insurance Co.*, of Brooklyn, N. Y., vs. *Lucinda M. Dunn*, administratrix, 20 O. S., 175; *Ackerly* vs. *Vilas*, 24 Wisconsin, 165; *Hall & Long* vs. *Rickett*, 9 Bush (not out); *Adams Express Co.* vs. *Frego*, 35 Maryland, 47; *Stephens* vs. *Howe*, 43 N. Y. Practice Reports, 134. 104 Mass Byant vs Rich

Boggs vs. *Willard, et al*, United States Circuit Court of northern district of Illinois, June term, 1872:—

"I will give only the syllabus of this case. The opinion still lives in manuscript, and has been published only in newspapers. I have before me a copy in each form.

"'Under the act of March 2, 1867, for the removal of causes from State to Federal courts, a party whose cause had been tried in the State courts and appealed to the Supreme Court of the State, where the decree of the court below has been reversed, with instructions to dismiss the suit, has no right to a transfer of the case.

"'*An application comes too late* after the issues have been tried in the State courts and a final hearing had.

"'It was not the intention of Congress that a party dissatisfied with an adjudication in the State courts should have the right to remove the cause into the Federal courts and there have a re-hearing.

"'If the case is such an one as to give the party a right to a writ of error to the Supreme Court of the United States, under the twenty-fifth section of the judiciary act, a review may be had in that manner, but in no other.'"

For the above I am indebted to the brief of R. W. Woolley, Esq., of Louisville, Ky.

We submit in conclusion of this point that this application to remove this case was too late to be within the terms of the law of March 2, 1867, because it was after a final trial and the refusal of a new trial, and while an appellate proceeding was pending, that was based on a final trial and final judgment; that such an operation of this law of Congress would subordinate it to the legislation of the States, and make the United States Circuit Court dependent on the legislation of Ohio for jurisdiction over this case, and defeat the intention of Congress and cause injustice. For these reasons we submit the application to remove this case was too late to be within the terms of this law.

CONSTITUTIONALITY OF THE LAW.

We next submit that if the application for removal, after a second trial was taken, was in time to be within the terms of the law of March 2, 1867, that then the law violates the 7th amendment to the constitution of the United States, which reads—

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

One branch of this suit was a suit at common law, and the amount in controversy exceeded twenty dollars; and all of the facts in the case were tried by a jury, and their verdict was affirmed before the case was removed into the United States Circuit Court for these same facts to be re-examined there, for a cause and under a preceeding not known to the common law,

nor within any of the rules of the common law. That this was a case in which the right of trial by jury existed, we refer the court to 10 O. S. 439. We further call their attention to the fact that it had become an adjudicated and settled matter in this case that this was a jury or common law case by the application of complainant in error for a second trial, and the finding of the court on his application; that this was a proper case for either party to demand a jury; that the right to demand it existed, and therefore he was entitled to a second trial instead of an appeal, and took it.

We cite the following to show what is meant by the clause, "and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

"It must be admitted that according to the construction uniformly given to the first clause of this amendment the suits there mentioned are confined to those in the Federal courts; and the argument is perhaps more than plausible, which is that the words, 'and no fact tried by a jury,' mentioned in the second, relate to the trial by jury as provided for in the previous clause. We have felt the full force of this argument, and if the two clauses were necessarily to be construed together and to be regarded as inseparable, we think the argument would be conclusive. ***But this is not the view that has been taken of it by this court.*** In *Parsons* vs. *Bedford et al*, Mr. Justice Story, in delivering the opinion of the court referring to this part of the amendment, observed 'that it should be read as a substantial and independent clause, and that ***it was a prohibition to the courts of the United States*** to re-examine any facts tried by a jury ***in any manner***. The history of the amendment confirms this view (*Debates in Congress* by Gales and Seaton, vol. 1, pages 452, 458, 784).' He further observed that '***the only modes known to the common law*** to re-examine such facts was the granting of a new trial by the court where the issue was tried, or the award of a venirie facias de novo, by the appellate court ***for some error that had intervened in the proceedings***. *The Justices* vs. *Murray*, 9 Wallace, 278.'" This decision proceeds with great clearness, and settles that after a trial of a case to a jury upon the merits and judgment has been entered, and a new trial for the causes existing at common law refused, the case can not be removed into the Circuit Court of the United Sates,

to be re-tried in any manner, notwithstanding another trial could have been had in the State courts; and to the same point is *Parsons* vs. *Bedford*, 3 Peters 433; *Wetherby* vs. *Johnson*, 14 Mass., 412; *Patrie* vs. *Murray*, 43 Barbour, 331.

The Supreme Court of New York, in treating of th[illegible] the 7th amendment in 43 Barbour, say: "It is urged th[illegible]e 7th amendment of the constitution only applies to the courts of the United States, and that this distinction was not adverted to in the case of *Wetherby* vs. *Johnson*. It is no doubt true that the State legislature is not restrained from passing laws, giving a party a new trial after the verdict in a manner not in accordance with the course of the common law. But after a verdict has once been rendered in a State court, Congress has no power to say, in violation of the 7th amendment of the constitution, that a new trial may be had in the United States Court. It makes no difference in what court the first trial took place, whether in the State or a United States court; the amendment was designed to prevent and to prohibit a second trial in the United States Court after one had previously taken place in any other court. It was intended to protect the party from a second trial being granted by a law of Congress in any and all cases where a trial by jury had once before been had. It matters not then where the issue of fact was tried by a jury, the prohibition is explicit and emphatic that it shall not be re-examined in the United States Courts otherwise than according to the rules of the common law. Conceding then that the 7th amendment is applicable to the United States Courts, with what reason can it be claimed that these courts are authorized to try a case over again because the first trial took place in a State court? * * *

"Upon principle it would be a remarkable and extraordinary proceeding if a cause could be removed after trial and judgment without regard to the action of the court before whom the cause was tried; with no error alleged; with no ground urged on the trial to indicate that any question had arisen which rendered it necessary, legal or proper that another tribunal (and that tribunal, of no higher grade than the court which had original jurisdiction) should take cognizance of it and proceed to its trial, without reference to what had previously taken place. * *

"My opinion is that the fifth section of the act of Congress, so far as it authorizes a removal of a cause after verdict, and a trial

nor within any of the rules of the common law. That this was a case in which the right of trial by jury existed, we refer the court to 10 O. S. 439. We further call their attention to the fact that it had become an adjudicated and settled matter in this case that this was a jury or common law case by the application of complainant in error for a second trial, and the finding of the court on his application; that this was a proper case for either party to demand a jury; that the right to demand it existed, and therefore he was entitled to a second trial instead of an appeal, and took it.

We cite the following to show what is meant by the clause, "and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

"It must be admitted that according to the construction uniformly given to the first clause of this amendment the suits there mentioned are confined to those in the Federal courts; and the argument is perhaps more than plausible, which is that the words, 'and no fact tried by a jury,' mentioned in the second, relate to the trial by jury as provided for in the previous clause. We have felt the full force of this argument, and if the two clauses were necessarily to be construed together and to be regarded as inseparable, we think the argument would be conclusive. ***But this is not the view that has been taken of it by this court.*** In *Parsons* vs. *Bedford et al*, Mr. Justice Story, in delivering the opinion of the court referring to this part of the amendment, observed 'that it should be read as a substantial and independent clause, and that ***it was a prohibition to the courts of the United States*** to re-examine any facts tried by a jury ***in any manner***. The history of the amendment confirms this view (***Debates in Congress*** by Gales and Seaton, vol. 1, pages 452, 458, 784).' He further observed that '***the only modes known to the common law*** to re-examine such facts was the granting of a new trial by the court where the issue was tried, or the award of a venirie facias de novo, by the appellate court ***for some error that had intervened in the proceedings***. ***The Justices*** vs. ***Murray***, 9 Wallace, 278.'" This decision proceeds with great clearness, and settles that after a trial of a case to a jury upon the merits and judgment has been entered, and a new trial for the causes existing at common law refused, the case can not be removed into the Circuit Court of the United Sates,

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"Upon principle it would be a remarkable and extraordinary proceeding if a cause could be removed after trial and judgment without regard to the action of the court before whom the cause was tried; with no error alleged; with no ground urged on the trial to indicate that any question had arisen which rendered it necessary, legal or proper that another tribunal (and that tribunal, of no higher grade than the court which had original jurisdiction) should take cognizance of it and proceed to its trial, without reference to what had previously taken place. * *

"My opinion is that the fifth section of the act of Congress, so far as it authorizes a removal of a cause after verdict, and a trial

and determination of the facts and the law in the same manner as if the same had been originally commenced in the Circuit Court of the United States, is in violation of the 7th amendment of the constitution of the United States, and is for that reason null and void.

"The common law knows nothing of a re-examination of facts once tried by jury, except in cases of new trial, which can only be granted by the court before which the trial was, no such thing as an appeal being known in that system," *Weatherby* vs. *Johnson*, 12 Mass., 420. This was a statutory trial, equivalent to an appeal, as the Supreme Court of Ohio has decided. The overruling of the motion for a new trial made it res adjudicata in this case; that no re-examination of this case could then be had; that none of the causes known to the common law for a new trial existed. The causes for new trial in Ohio are defined in section 297 of Code, page 1030, S. and C., and embrace all the causes known at common law for new trials. Where a new trial is granted at the common law, no judgment is entered, no lien is created or continued. It is not given without reason or cause as a second trial is. It is given because the party obtaining it is able to satisfy the court that error and wrong have occurred in obtaining the verdict. A statutory remedy is not a common law remedy. The State legislature of Ohio could not, by her own legislation, in 1858, enlarge an amendment to the constitution of the United States, which had then been in existence for sixty-seven years, and enable a United States Court to do that which this amendment prohibited. The term according to the rules of the common law must be construed according to what those rules were in 1789, at the time this amendment was adopted.

"The rules of construction direct a reference to the common law before the statute, the mischief complained of, the remedy, and the true reason of that remedy, 14 O. S. 80, 87; 4 Ohio, 45, 62; 5 Ohio, 121, 123; 6 Ohio, 438, 440."

At this time there were no States in the Union the basis of whose jurisprudence was not essentially that of the common law in its widest meaning, 3 Peters, 446.

"The only modes known to the common law to re-examine such facts, (facts once tried by a jury,) are the granting of a new trial by the court where the issue was tried or to which the

record was properly returnable; or the award of a venirie facias de novo, by an appellate court, for some error of law which intervened in the proceedings. The judiciary act of 1789, ch. 20, sec. 17, has given to all the courts of the United States power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law, 3 Peters, 446-7."

Never, in the practice in any United States court, did the court award a new trial where it found no wrong had occurred, by requiring the defeated party to give bond to secure the claim, and still leave a judgment in force as a lien on real estate.

We think we have shown that if the law of March 2, 1867, admits of a construction which authorizes a case to be removed from a State Court to a Circuit Court of the United States, to be tried over again on the facts, after every fact has already been tried to a jury, and their verdict affirmed, and judgment entered on it, and a new trial refused, then the law violates that part of the 7th amendment of the United States constitution which says, that no fact tried by a jury shall be re-examined in the courts of the United States, otherwise than according to the rules of the common law, which are the rules for securing new trials, and that therefore for this reason this law is void.

THE LAW VIOLATES THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

If, however, we shall be mistaken in the views we have given why this case should not have been removed, we then insist that the law of March 2, 1867, was unconstitutional for another reason, to wit: that it destroyed the second trial bond that had been given in the State court to secure the claim being litigated, without the process of law, and without consideration or any equivalent bond being substituted. By reference to the second trial decision heretofore quoted, it will be seen that before this motion for removal was made, the plaintiff in error had given a bond for our benefit, in order to secure a second trial, entirely satisfactory to the clerk, conditioned to the effect that the plaintiff in error would abide by and perform the order and judgment of the court in which the bond was given (the Hamilton Common Pleas), and pay all moneys, damages, and costs which should be awarded against this plaintiff in error consequent upon such

second trial in that court, and that if he should not do this they the securities would. The practice in such cases is to fix the bond in double the amount of the claim, or double the amount of the judgment and costs, and to require two real estate securities who are able to swear that they each own that amount of real estate in the county over and above all their debts and the exemptions of the law. Such a bond, in the sum of $4000, existed when this application and order for removal were made. The only bond required or given to remove was conditioned to see that a full and correct transcript of the proceedings thus far had in the State court should be lodged in the Circuit Court of the United States for the Southern District of Ohio before the commencement of its next session. The law of March 2, 1867, in this respect, reads thus:—"And offer good and sufficient security for his entering in such court, on the first day of its next session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and doing such other appropriate acts as, by the act to which this is amendatory, are required to be done upon the removal of a suit into the United States Court; and it shall be the duty of the court to accept the surety, and proceed no further in the suit," etc.; and the law of 1866 goes on to provide that the bond in the State court shall be vacated by the order of removal. The conditions of a bond as to the sureties must be strictly construed. They can not be enlarged beyond the letter of the condition.

The condition of a bond to pay a judgment to be obtained at a second trial in the court of common pleas of Hamilton county, Ohio, is not answered by a judgment obtained in the Circuit Court of the United States, and the sureties on such a bond could not be made to answer to such a judgment, while the sureties on the bond for removal, as before stated, are only liable to see that a transcript of the case is filed in the United States Court in a certain time.

Between the giving of the bond for a second trial and the taking place of the second trial the judgment debtor may become utterly insolvent, and his sureties become uneasy, and for their own protection induce him to make the necessary affidavit and take the proper steps to remove his case into the United States Circuit Court, and either go on his bond for the removal of the case, or secure others outside to go on such bond, and

thereby discharge themselves from their liability for the judgment that otherwise would probably be obtained in the State court, and leave the party that would have been secured in the State court without any security to make his judgment when he obtains it in the United States Court. Such will be the operation in this case if this company becomes insolvent before we obtain a judgment against them in the United States Court, if we are still compelled to go there to litigate this case with them.

The 5th amendment of the constitution of the United States provides that no person shall be deprived of life, liberty, or property without due process of law. The word property includes every right or thing having value, contingent or otherwise. Due process of law is not by legislating a man out of right. It was to prevent and destroy such legislation that the words process of law were used. Process of law involves a separate and particular suit and trial to contest and compensate for the property taken, as the following authorities show. It involves a judicial trial, and such a law as this would be void. Bouvier's Institutes, 3 vol., 187, Sec. 2790; Cooley's Constitutional Limitation, 105–110; and the numerous authorities there cited show a judicial proceeding must be had to take any right or interest that any man has in any property or bond.

We have thus shown, as we think, that the law of March 2, 1867, did not authorise this case to be removed after a trial of all the facts in the case to a jury, and the refusal of a new trial; and a second trial was taken, with a judgment in force, with the same effect as if the case had been appealed. That if the law did authorize this case to be removed at such a stage, for all of the facts to be re tried in the United States Circuit Court, that the law violates that part of the 7th amendment of the United States constitution which provides that no fact once tried by a jury shall be re-examined in any court of the United States otherwise than according to the rules of the common law, which is by obtaining a new trial for cause, and not a State statutory trial on terms without cause; and that, in addition to the fact that this law violates the 7th amendment under the construction contended for by plaintiff in error, it also violates the 5th amendment to the constitution of the United States by depriving the defendant in error of a valuable security, to wit: the second trial bond, without a trial or hearing for that purpose,

second trial in that court, and that if he should not do this they the securities would. The practice in such cases is to fix the bond in double the amount of the claim, or double the amount of the judgment and costs, and to require two real estate securities who are able to swear that they each own that amount of real estate in the county over and above all their debts and the exemptions of the law. Such a bond, in the sum of $4000, existed when this application and order for removal were made. The only bond required or given to remove was conditioned to see that a full and correct transcript of the proceedings thus far had in the State court should be lodged in the Circuit Court of the United States for the Southern District of Ohio before the commencement of its next session. The law of March 2, 1867, in this respect, reads thus:—"And offer good and sufficient security for his entering in such court, on the first day of its next session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and doing such other appropriate acts as, by the act to which this is amendatory, are required to be done upon the removal of a suit into the United States Court; and it shall be the duty of the court to accept the surety, and proceed no further in the suit," etc.; and the law of 1866 goes on to provide that the bond in the State court shall be vacated by the order of removal. The conditions of a bond as to the sureties must be strictly construed. They can not be enlarged beyond the letter of the condition.

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thereby discharge themselves from their liability for the judgment that otherwise would probably be obtained in the State court, and leave the party that would have been secured in the State court without any security to make his judgment when he obtains it in the United States Court. Such will be the operation in this case if this company becomes insolvent before we obtain a judgment against them in the United States Court, if we are still compelled to go there to litigate this case with them.

The 5th amendment of the constitution of the United States provides that no person shall be deprived of life, liberty, or property without due process of law. The word property includes every right or thing having value, contingent or otherwise. Due process of law is not by legislating a man out of right. It was to prevent and destroy such legislation that the words process of law were used. Process of law involves a separate and particular suit and trial to contest and compensate for the property taken, as the following authorities show. It involves a judicial trial, and such a law as this would be void. Bouvier's Institutes, 3 vol., 187, Sec. 2790; Cooley's Constitutional Limitation, 105–110; and the numerous authorities there cited show a judicial proceeding must be had to take any right or interest that any man has in any property or bond.

We have thus shown, as we think, that the law of March 2, 1867, did not authorise this case to be removed after a trial of all the facts in the case to a jury, and the refusal of a new trial; and a second trial was taken, with a judgment in force, with the same effect as if the case had been appealed. That if the law did authorize this case to be removed at such a stage, for all of the facts to be re tried in the United States Circuit Court, that the law violates that part of the 7th amendment of the United States constitution which provides that no fact once tried by a jury shall be re-examined in any court of the United States otherwise than according to the rules of the common law, which is by obtaining a new trial for cause, and not a State statutory trial on terms without cause; and that, in addition to the fact that this law violates the 7th amendment under the construction contended for by plaintiff in error, it also violates the 5th amendment to the constitution of the United States by depriving the defendant in error of a valuable security, to wit: the second trial bond, without a trial or hearing for that purpose,

and therefore without process of law, and also without consideration, as nothing as a substitute therefor is required or was given.

Having closed our argument of this case, we desire to answer some of the views that the counsel for complainant in error have heretofore advanced in the State courts, to which we now reply.

It is contended by counsel for plaintiff in error that after actual removal it is too late to get the case re-instated in the State court by any action of the State court. The remedy, if the removal was wrongful, is by application to the Federal court where the cause is pending, and by writ of error thence in the Supreme Court of the United States; and that this is so because this court has jurisdiction to reverse the order made on this subject by the Supreme Court of Ohio, showing that the Federal and not the State courts have the last final decision of the question that finally settles and concludes the parties; and that having amended our petition in the United States Court we are estopped to deny its jurisdiction.

We shall endeavor to answer these views in their proper order.

1. If the law did not authorize this case to be removed into the United States Circuit Court by the plaintiff in error, after he had been refused a new trial and had taken a second trial, or the law was unconstitutional for either of the reasons alleged by us, then the order of removal and the filing of the transcript in the United States Court did not of themselves vest that court with any jurisdiction whatever, as we have before shown. If the law did not vest the United States Court with appellate jurisdiction in this case, then our appearance there did not vest it with such jurisdiction, 16 Peters, 525; 1 Washington C. C. 232. "The Supreme Court will not, when requested by the counsel for plaintiffs and defendants in error in a case in which it has not jurisdiction to affirm or reverse the judgment of the court from which the same has been brought by a writ of error to a State court, examine into the questions in the case and decide upon them. *Consent will not give jurisdiction* When the act of Congress has so carefully and cautiously restricted the jurisdiction conferred upon this court over the judgments and decrees of the State tribunal, the court will not exercise jurisdiction in a different spirit, syllabus of *Mills et al* vs. *Brown et al*, 16 Peters, 525." The case of *Exparte* vs. *Cabrie*, in 1 Washington Circuit

Court Reports, 232 heretofore quoted, shows that the same principle applies to circuit courts of the United States as to the supreme courts. They cannot take jurisdiction by consent that is not given them by a law of congress: their jurisdiction is limited. Therefore if the order of removal was unauthorized, our appearance in the United States Circuit Court did not invest that court with any appellate jurisdiction, though it may have invested it with an original jurisdiction, because one party was a resident and the other a non-resident.

Conceding, for the purpose of this argument, that our appearance in the United States Circuit Court did invest that court with original jurisdiction over the case, that did not affect the status of things in the State court, because the pendency of two separate suits between the same parties in different states at the same time, the one generally is not a bar to the other, and the second suit is never a bar to the first. In the same State the first original suit controls—it has the preference. The Circuit Court of the United States sitting in Ohio and the Ohio State courts are separate, independent jurisdictions, having no relations whatever to each other any more than one of the State courts of Indiana has over one of the State courts of Ohio, particularly where there is no law authorizing the given case at this stage to be removed into the United States Circuit Court, and if either of these original suits could be a bar to the other it would be that in the State court that would be the bar, and that in the United States Circuit Court that would be barred. That the pendency of two or more suits at the same time between the same parties concerning the same subject matter has the effect above alleged, see *Bowen & Seymour* vs. *Joy*, 9 Johns, 219; *Welch* vs. *Dirken*, 12 Johns, 99; *Hate* vs. *Holley*, 3 Wend, 263; *Salmon* vs. *Walton*, 9 Dana, 422; *Colt* vs. *Partridge*, 7 Metc. (Mass.), 570; *Haup* vs. *Granger*, 1 Conn., 154; *Ralf* vs. *Brown*, 3 Watts & Sargt., 399.

The plea that what was done in the United States Court is an estoppel to the jurisdiction of the State court, assumes that the order of removal was illegal, and that order being erroneous—not authorized by the law of the United States—the action of the United States circuit court could not affect the status of the case in the State court, particularly while the matter in the United States court has never been tried there, or reduced to judgment

as we have heretofore shown, and that our appearance there only instituted another original suit at best, leaving a prior original suit pending in the State courts, which original suit in the State court has since been reduced to final judgment by the consent of plaintiff in error.

The argument that what was done by us in the Circuit Court of the United States estops us from our proceeding in the State courts, to reverse the order of removal of the Common Pleas Court, reinstate the case, and have the second trial; and that the District State Court had no right to review the order of its next subordinate court, comes in bad grace from counsel for plaintiff in error, and is not law. Counsel forget that Congress do not possess the power to meddle with rules of proceedure in State courts by any law they can enact. Such matters are internal, local, and belong exclusively to the State and State courts. They are not within any of the powers delegated to Congress, but are among the rights reserved to the State and the people: Cooley's Constitutional Limitations, 13, and the numerous authorities their cited; also, *Warren* vs. *Paul*, 22 Indiana, 276; *Jones* vs. *Keep's Estate*, 19 Wis., 369; *Fifield* vs. *Close*, 15 Mich., 505; Kent's Com. Lecture, 19, 1 vol., 411, 12; *Diggs & Keith* vs. *Wolcott*, 4 Cranch, 179; 5 Howard, 504; 5 Wallace, 470.

"The (U. S.) Circuit Court cannot quash proceedings against a public minister depending in a State court; nor can the court in any way interfere with the jurisdiction of the courts of a State," *Exparte Cabrie*, 1 Washington C. C. Report, 232.

"The order of the Court of Common Pleas removing the cause from that court was a final order, which the District Court was authorized to review on error, Code, section 512, 513, S. and C. statute, 1099. The order determined the action in that court, and prevented a judgment, and, if erroneous, affected the plaintiff's substantial rights. Nor was the right of the plaintiff to have the order reviewed on petition in error impaired by the action of the defendant below in filing the transcript of the proceedings in the Circuit Court, nor by the fact that the motion of the plaintiff to dismiss the cause for want of jurisdiction in that court had been overruled. The question before the District Court on the petition in error was precisely the same as that raised by the petition of the defendant below for decision in the court of Common Pleas, viz.: whether the removal of

the cause from the State court to the circuit court was authorized by law. The jurisdiction of the District court, *was not dependent upon the way* the question had been decided in the court below. The authority of the District court was to revise the action of the subordinate court, and as such action was found to be in accordance with or against law, to affirm or reverse it." 20 O. S, 180-1. See also *Hadly* vs. *Dunlop*, 10 O. S, 1; *Ackerly* vs. *Vilas*, 24 Wis., 165. 23 La Ann 29. 92 La 590 67 Miss 33

It matters not that the Supreme Court of the United States has authority to review the decision of the supreme court of a State on the construction of a United States statute raised in a case in the State court; such jurisdiction does not belong to a Circuit court of the United States to review the decision of any State court, nor does jurisdiction of the United States Supreme Court for such a purpose lie through a Circuit court.

This is well understood by counsel for plaintiff in error. They brought the same kind of a suit in error in the Supreme Court of Ohio to reverse the decision of the District Court, which in the District Court they contended, and now contend, that no State court had jurisdiction to entertain, and after being defeated in the Supreme Court of Ohio on this question, they submitted to another trial in the State courts on the merits of the case, without coming here at once and preventing such a trial. Being defeated then they brought a suit in the District Court to set aside this second judgment on the merits, a court which they now say had no jurisdiction, and whose judgment, had it been in their favor, they would have plead against us as conclusive. All this may be consistent with their argument on estoppel, but we fail to see it. It was competent for the State courts to assume jurisdiction of this case by the consent of the parties, which they did, and proceeded to final judgment on the merits against the complainant in error after this decision (20 O. S., 175) now under consideration by this court was made.

Gohlson, J.: "As to the first point raised in this case, the jurisdiction of the court of common pleas, we think that whatever force it might have claimed, had it been presented at the proper time, the plaintiff in error must be regarded as having waived it by his failure to object, *and proceeding to a trial upon the merits. The case was one of which the court of common pleas would have had original jurisdiction. It was brought by the plaintiff*

in error into that court by appeal. He answered the petition and proceeded to trial without objection. He cannot be allowed thus to speculate on the chance of a favorable verdict, and then turn around and deny the jurisdiction of the tribunal to the decision of which he had submitted his case. It was competent for that tribunal to assume jurisdiction by the consent of the parties, and the parties must be understood as having given such consent," ***Bisher*** vs. ***Richards***, 9 O. S., 498.

Land-Iowa 243

Like the above case this case was one of which the State court had original jurisdiction, which is the only kind of jurisdiction the Federal court had, the order of removal being unauthorized by law. This original jurisdiction in the State court (if the removal had been right) could be re-invested in the State court by the consent of parties. That alone might not have changed matters in the United States Circuit Court; but the plaintiff in error submitted to a second trial in the State court, that resulted in a final and conclusive judgment against him on the merits of the case. He did not stop here. He then brought a suit in error to reverse this judgment on the merits. This suit was brought in the District Court. We were summoned to appear and defend it. We did so. It resulted in another complete and final judgment against the plaintiff in error. that is now in full force, and concludes him the world over in any court he may appear. See second trial judgment, petition, summons, return, judgment, pages 24-6, Sections 78 to 92 of record.

Both of these trials, to which we refer, were long after the Supreme Court of Ohio had rendered the decision reported in 20 O S., 175, that the order of removal was wrongful, and should be set aside. They were therefore long after the plaintiff in error might have been in this court if he had not elected to take a shorter course to conclude us. Of this there is no question: *Weston* vs. *Charleston*, 2 Peters, 449; *Holmes* vs. *Jennison*, 14 Peters, 540; 25th Section of the Judiciary Act of 1789.

"The power of this Court to revise the judgments of state tribunals depends on the 25th section of the judiciary act. That section enacts 'that a final judgment or decree in any suit in the highest court of law or equity of a state, in which a decision in the suit could be had,' where is drawn in question the validity of a statute, or of an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their

validity, 'may be re-examined, and reversed or affirmed in the Supreme Court of the United States.'

"The city council of Charleston, exercising an authority under the state of South Carolina, enacted an ordinance, by which a tax was imposed on the six and seven per cent. stock of the United States; and in the court of common pleas of the Charleston district, an application was made for a prohibition to restrain them from levying the tax, on the ground that the ordinance violated the constitution of the United States. The prohibition was granted, and the proceedings in the case were removed to the constitutional court, the highest court of law of the state; and in that court it was held that the ordinance did not violate the constitution of the United States, and a writ of error was prosecuted on *this decision* to this Court. ***Held, that the question decided by the constitutional court, was the very question on which the revising power of this Court is to be exercised.*** * * ***It is not required that such judgments shall finally decide upon the rights which are litigated, that the same shall be within purview of the section.***"—*Weston* vs. *City of Charleston*, 2 Peters, 449.

These further efforts of the complainant in error to defeat us upon the merits were entirely unnecessary to secure jurisdiction in this court to have the question of jurisdiction determined, as these authorities show. Neither was it necessary for the plaintiff in error to sue us in error in the District Court to reverse the judgment rendered on the verdict of the jury at the second trial in the Common Pleas Court. He had three years for error on that judgment if this court should decide the State court had jurisdiction, and he yet has ample time to go on error to the Supreme Court of Ohio to have the last judgment of the District Court reversed, if this court shall decide the State court had jurisdiction. If he is refused leave there to file his petition in error, it will be because that court, after hearing the case argued, and looking over the record will decide that he has no case for error, the same as they did in the case in 20 O. S., 175. The plaintiff in error did more than to give original jurisdiction again to the State courts if it was lost before. At his instance the District State Court got jurisdiction of the case, and rendered final judgment against him. If the judgment of that court had been otherwise, notwithstanding we were defendants, it would have concluded us;

and as it would have concluded us it must conclude him, as the law has no favored suitors.

Having re-invested the State courts with that original jurisdiction they first had, by his voluntary appearance there when he could have been here, and bringing a suit there in his own name, and having summons issued on it to bring us into court, and adding to the expenses of the litigation in an endeavor to obtain a conclusive judgment against us, plaintiff in error is concluded by the final judgment thus obtained against him, and is estopped from claiming estoppel, or that the State courts rendered these judgments without jurisdiction; for this reason also we insist the judgment of the Supreme Court of Ohio should be affirmed.

Having shown that the order of removal was wrong, and having answered the reasons alleged by the plaintiff in error that proceed on the basis that it was wrong, but that we should be estopped from setting up this wrong, we desire to submit a few general remarks respecting the case not so closely connected with the question under consideration. This case has been tried three times in the State court upon the merits, and each time decided in our favor; two of these trials were before juries, the other on error to a court of three judges learned in the law. If this case shall be sent to the United States Circuit Court to be tried again, we are confident the result there will be the same that it was each time in the State court, for law and equity are administered upon the same terms and principles there as in the State courts, and their judges and juries convinced by the same facts and course of reasoning as those of the State courts. But our client is poor and unable to follow this litigation further than is absolutely necessary, and therefore we object to it.

We have this further to say, that we owe an apology to the judge of this court, who heard the motion in the Circuit Court to have this case sent back to the State court, for not presenting the matter to him as it is now presented. We had made the same mistake in the Common Pleas Court before Judge Force, when the case was ordered to be removed, but when we came to re-argue it fully before him in the District court he saw his error, and cheerfully joined his associates in that court in setting aside the order he had made below, and such we believe will be the course of Judge Swayne and all his associate members of this

court; for we have no idea that he or any of the State courts that have passed upon this question, had any desire, or have any now, except to administer the law as it is.

These State courts, ever since the organization of the government, have cheerfully conceded and aided to sustain the rights that rightfully belong to the Federal Government and its courts, and the decisions of this court on all questions have been to them leading and controlling authorities. The members of these State courts have long been noted as pure and able lawyers. When counsel ask the greatest court upon the globe to rebuke so many of these State courts; when the law does not authorize a rebuke or warrant it, they forget the character, ability, integrity, and dignity of the court they are addressing, and the comity that has always prevailed with all the courts of the land, and which it is necessary and desirable to have continued in the future; and they not only call in question the ability of the State courts, but their respect for their judicial oaths. Such a censure would be unmerited by Judge Force for having reversed himself, and by Judge Drummond for refusing to take jurisdiction, and to more than a score of other judges equally able and pure, and I feel will not be sanctioned by this court.

In conclusion, we have shown this application to remove this case into the Circuit Court of the United States was after its final trial, while an appellate proceeding was pending undetermined, and after the right to remove it under the laws of Congress was closed; and that it could not be acquired by State legislation because this would subordinate the laws of Congress to State legislation, make the Circuit Court of the United States dependent on State legislation for jurisdiction over this case, and render the laws of Congress ununiform in their operation in the different States. That such a construction of the law defeats the 7th amendment to the Constitution of the United States, as it allows the re-trial of a case in the United States courts on the facts, after the same have been fully tried before a jury, and the right to a re-trial, under the rules of the common law, exhausted; also, that it would be taking and destroying property in the shape of a second trial bond without the process of law, without an adjudication or compensation, in violation of the 5th amendment of the constitution, and permit the plaintiff in error to re-invest the State courts with their original jurisdiction (if it

was lost before) in an effort to obtain a conclusive judgment against us on the merits of the case; and then when defeated with a final judgment against him, unreversed, unvacated, or anything else, to entirely escape its effects. For each and all of these reasons we trust the judgment of the Supreme Court of Ohio will be affirmed with costs.

W. H. STANDISH,
For Defendant in Error.

"Story, J., delivered the opinion of the court.

"The first question in this case is whether the commencement of another suit for the same cause of action in the court of another State, since the last continuance, can be pleaded in abatement of the original suit. It is very clear that it cannot. A subsequent suit may be abated by an allegation of the pendency of a prior suit; but the converse of the proposition is in personal actions never true. The decision of the Circuit Court of the district of Columbia, overruling the plea, was therefore correct. *Renner & Bussard* vs. *Marshall*, 1st Wheaton, 217."

"[NOTE.] But whether the suit be pending in a foreign or a domestic court, a prior suit cannot be abated by the allegation of the pendency of a suit subsequently brought."

"[NOTE.] The exception rei judicata applies to final or definitive sentences in another State, or in a foreign court upon the merits of the case; and the rule has even been applied to the pendency of a cause in an inferior court in the same State. 9 John's Reports, 221. *Bowe* vs. *Joy*, and the authorities there cited."

Supreme Court of the U. S.

DECEMBER TERM, 1873.

THE HOME LIFE INSURANCE COMPANY OF BROOKLIN, N. Y.
Plaintiff in Error,

vs.

LUCINDA M. DUNN, Administratrix of John C. Dunn, deceased,
Defendant.

SECOND BRIEF BY

W. H. STANDISH,

Attorney for Defendant in Error.

H. WATKIN, PRINT. COR. 8TH & WALNUT.

Supreme Court of the United States,

DECEMBER TERM, 1873.

THE HOME LIFE INSURANCE COMPANY OF BROOKLIN, N. Y.
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Defendant.

I cannot agree with the statement of the facts and the law of this case that has been made by the worthy counsel opposed to me.

All trials are final or interlocutory, and as the trial of this case before the jury, that occurred before the order of removal was sought in this case, was not an interlocutory trial, it was therefore a final trial; besides, before that order was made, the plaintiff in error had taken a second trial under the second trial statute of Ohio, which is allowable only after a final trial and after a final judgment, and such final judgment, after a second trial is taken, remains in force as a lien on real estate, having all the force in every respect of judgments in cases pending for appeal, awaiting their appellate trial.

Several of the Supreme Courts of the States have decided that a case cannot be removed under this law of March 2nd, 1867, even after a new trial has been awarded under the rules of the common law; while all the courts, State and Federal, have thus far decided that it cannot be removed after one final trial before a new trial has been obtained, for the equitable reasons established by the rules of the common law for new trials as those rules existed in 1789. This should conclude all argument in this case, for as before stated it was finally tried and no new trial was awarded, but, on the contrary, was expressly refused, even after the plaintiff in error had filed a motion for a new trial, and had made a full argument to obtain it. No exception was

taken. Five days after this, and after a final judgment had been rendered in the case, and it was conclusively settled that no new trial or re-examination of this case could be had under the rules of the common law, the plaintiff in error gave a second trial bond, which, under the Ohio statute and practice, fixes the date at which he took a second trial under the second trial statute of Ohio; and because this second trial statute gave a second trial in the same court where the rules of the common law excluded it, the plaintiff in error claims the right to remove under the law of March 2nd, 1867, to have a re-trial, in the United States Court, of the facts of the case. If this law of March 2nd, 1867, authorizes such a proceeding, then it violates the seventh amendment to the United States Constitution, because it authorizes a re-trial in a United States court after a previous jury trial affirmance of verdict, and with a judgment in the case which is contrary to the practice of the common law and where the common law excludes it; and, furthermore, a second trial in Ohio, under this second trial statute, is obtained by giving a bond in double the amount of the judgment at the first trial, to secure the judgment to be obtained at the second trial in the State court, which is in the nature of an agreement to stay in the State courts as a condition on which the second trial is taken, and therefore a waiver of the personal privilege of removal.

It therefore follows that if this law can be so construed as to authorize a removal after the right to another trial, under the rules of the common law, has been exhausted, merely because there is a statute in Ohio, that exists in no other State, that authorizes another trial after this in jury cases, then the law is void; and therefore, however this law of Congress is to be construed, it did not authorize this case to be removed, and it is for this reason a matter of little consequence to us how it is to be construed. But the court will no doubt be glad for any suggestions that will aid them in determining whether this law is to be construed as not applying to this case, or that it would have applied but for constitutional reasons. I will submit the following thoughts that have occurred to me, showing that this law cannot be so construed as to authorize a removal after a second trial has been taken under this second trial statute of Ohio.

This law, being a harsh one, as Judge Miller has said, must be strictly construed against the harsh rights claimed under it. New trial is entirely a common law remedy. It came to us from the rules of the common law, and has been continued in Ohio to the present day as it exists in every other State, and prevails at the present time in the practice in the United States courts, and as it prevailed in every State at the time the seventh amendment was made to the United States Constitution. The filing of the motion for a new trial in this case, and the overruling of it without exception after argument, makes it res adjudicata on this point, that no right to a re-examination existed in this case under the rules of the common law; and by this decision and the action of these parties they and this court are concluded from inquiring into whether a new trial was taken in this case, or denying that a new trial in this case did not lie under the rules of the common law; and all were so concluded at the time the application to remove was made. This law of Congress must be construed with reference to the rules of the common law at the time the seventh constitutional amendment was made and adopted, which was in the year 1789. This is the first rule for the construction of all legislation and all language. Terms must be construed as they prevailed and were understood at the time they were incorporated into the law. At that time neither this second trial statute of Ohio nor the State of Ohio had any existence, and it cannot add now to those terms to destroy the restrictions of the Constitution of the general government against a re-trial of a case in a United States Court, after it has been finally tried by a jury, and their verdict affirmed. Aside from this this court tells us in 3 Peters, 446, that at this time there were no "States the basis of whose jurisprudence was not essentially that of the common law in its widest meaning, and none were contemplated in which it would not exist in its fullest extent." This I quote verbatim from this court, so it will be seen that second trial after the refusal of new trial was a proceeding unknown and never contemplated by the framers of the Constitution, and as this law is to be construed, if possible, so as to make it constitutional, it must be construed in this view.

I next call the attention of the court to the following authorities showing what a new trial was granted for—what the rules of the common law for another re-examination were—in order

to show further along that it is a proceeding much unlike a second trial under the second trial statute of Ohio:—*Parsons* vs. *Bedford*, 3 Peters, 446; *the Justices* vs. *Murray*, 9 Wallace, 278; *Parrie* vs. *Murray*, 43 Barbour, 331; *Weatherbee* vs. *Johnson*, 14 Mass., 420; *McKee* vs. *Ramer*, 10 Wallace, 25.

Where a new trial is granted the verdict of the jury is set aside, no judgment is entered, no judgment lien is created. It is based on equity, and cannot be had without equity; such as that the verdict was contrary to the weight of evidence, or the law of the case, surprise, newly discovered evidence, misconduct of jury, and the like causes. None of these causes existed in this case for another trial, nor did any equitable reason whatever exist for another trial, but all equitable reasons were against it as the court adjudged. The verdict of the jury, instead of being set aside, was affirmed by the court, and after that judgment was entered in our favor on it. Nor was this judgment destroyed by the taking of a second trial, but it was in force as a lien on real estate at the very time the order of removal was made, and had at that time all the life and force it would have had if the case had then been pending on appeal in the district court, which is never the case where a new trial is allowed under the rules of the common law.

Appeal in Ohio is the same as in other States, and, in the Federal courts, vacates the judgment below, except that it is continued in force as a lien until the appellate trial takes place, in order to secure the claim; and this is the operation in cases of second trial in Ohio under the second trial statute. Appeals in Ohio cannot be obtained without a final hearing and final judgment, or final order in the court below; while second trials are predicated on final trials, final orders, and final judgments, and, as before stated, after either appeal or second trial is perfected this final judgment still has in each case the same force and operation; while under the rules of the common law there can not be a new trial based on a final order or final judgment in the case. An appeal cannot be taken without executing a bond signed by two real estate holders of the county, in double the amount of the judgment obtained at the first final trial; and the same kind of a bond is required to obtain a second trial, a practice entirely unknown to the rules of common law for the obtaining of a new trial. Second trials are obtained on the

same terms in every respect as appeals. The final judgment obtained at the first trial has the same force after a second trial is taken as after an appeal is taken, and everything about the two proceedings is the same, except one is a chancery case and the other a law case, or law and chancery together, and the second trial takes place in the same court the first trial was had in instead of in the district court. On appeal everything stands for trial as if there had been no previous trial; and this is the case on second trial and on new trial, and this is the only thing in which these three proceedings are precisely alike, and because on second trial everything stands for trial as if there had been no previous trial, does not aid the plaintiff in error any more than the fact that such is the case on appeal.

New trials are had for equitable reasons, while second trials are had upon terms where all equitable reasons are against another trial. The second trial statute of Ohio was passed in 1858. It is entitled "An Act to Relieve the District Courts and Remedy the Judicial System of Ohio." It cuts off the right to appeal in all common law cases, and substitutes a second trial in the place upon the terms, conditions, and effect of appeal as before stated. The necessity which gave rise to this second trial statute was this:—All cases that originated in the court of common pleas could be appealed to the district court, save those of divorce and the like, to be re-heard in the district court as if they had originated there; both law cases and equity cases. The district court is an intermediate court between the common pleas courts and the Supreme Court of Ohio. It was composed of one judge of the Supreme Court and three judges of the common pleas courts, and it required a majority of these to do business or render a decision. The district court was held in the rural counties once a year. In Hamilton county, where Cincinnati is, twice a year. All business that had come up from the common pleas court had to be tried and decided, and in all common law cases these four judges were required to wait for the jury to hear and decide the facts. Each of the five judges of the Supreme Court had each year to waste his time over one-fifth of the State in this manner, while the docket of the Supreme Court of Ohio was becoming greatly encumbered; and these three common pleas judges had to uselessly spend their time, that was needed in the court below, the common pleas,

which is a court of one judge, three common pleas districts making a district court district.

To remedy this evil the legislature cut off the right to appeal jury cases to the district court, and provided that the appellate trial should take place in the court below before a jury and one judge, instead of before a jury and four judges in the district court. The statute by which they did this is entitled, "An Act to Relieve the District Court," as before stated. This Act has been construed by the Supreme Court of Ohio, and that court says that a second trial under it is an appellate proceeding, and it has never been held to be anything else than an appellate proceeding by the Supreme Court of Ohio. In 20 O. S., after setting forth what a second trial in Ohio is, that court says:— "It is competent for the legislature to take away the right of appeal and of a second trial." If this were done there would be no ground for the removal of this case under the Act of Congress. The true construction of the Act does not, as we think, make its operation depend upon whether the legislature of the State allows or does not allow the exercise of *appellate jurisdiction after a common law trial*, (which is when a second trial is taken under this second trial statute,) or a final hearing of a suit in equity in the court of original jurisdiction, which is where an appeal to the district court is taken. Both proceedings, are styled by the Supreme Court of Ohio as appellate proceedings, and a second hearing under this second trial statute is as much of an appellate proceeding as the second hearing that is had under the statute authorizing an appeal to the district court according to this decision. The construction of this second trial statute of Ohio having been fixed by the Supreme court of that State, this court will adopt that construction and follow it, for such have been the uniform decisions of this court from its first organization (read *Elmandorf* vs. *Taylor*, 10 Wheaton), and therefore this case, so far as the right to remove is concerned, stood at the time it was removed as if it had been then pending on appeal in the district court, and it will not be questioned that if it had been pending on appeal in the district court at the time of removal, it could not have been removed.

There are other reasons quite as grave as any I have stated why this law can not be so construed as to authorize a removal

after a new trial had been refused, and a second trial had been taken under this second trial statute. It would authorize a single State, in 1858, to enlarge terms incorporated into the United States Constitution sixty-nine years before (in 1789), and thereby override the Constitution. These terms, according to the rules of the common law, must be construed as they existed in 1789, and can not be enlarged by legislation or judicial construction, as this court has expressly decided. Such a construction would place the jurisdiction of the Federal courts at the mercy of State legislation, for if the States have the authority to increase the jurisdiction of the Federal courts, they certainly must have the authority to diminish it, and this authority carries the right to destroy. There was a time fixed by Congress in which the removal should be made. That time passed when the motion for a new trial was refused, and these parties claim that this second trial statute of Ohio extended that time, and gave the Federal courts the right to entertain jurisdiction of this case, when, both under the law of Congress and under the Constitution, the time for this had expired; and thereby, if such was the case, the jurisdiction of the United States Court over the case arose from State legislation. Such a construction would defeat all the decisions of this court—that a United States Court has no jurisdiction not expressly given to it by the Constitution and the laws of Congress. It would make the jurisdiction of the circuit courts of the United States, in cases like this, greater when setting in Ohio than they could be in any other State, violating the decision of this court in 3 Peters, 443 (case of *Parsons* vs. *Bedford*); that their jurisdiction must be uniform in the different States; and it would make the laws of Congress ununiform in the different States, and subordinate in each State to State legislation. It would defeat the intention of Congress. The Congress of 1867 was composed of senators and representatives from 35 or 36 different States, who knew nothing of a second trial statute in Ohio, outside of the Ohio senators and representatives, and who never intended to give a non-resident a longer time to linger and experiment in the State courts of Ohio, before asking to go into a United States Court, than he would have in any of the late rebellious States of the South; and, aside from all this, such a construction shocks every lawyer's sense of justice, even of the most

centralizing republican school; and in this case such a construction would be more shocking than any of the other reported cases, for, outside of Ohio, if a non-resident submits to a final trial, he is at the end of his rope unless he can get a new trial; and he cannot hope for a new trial without equity in his case. But in Ohio, however rotten his case is, he can submit to a final trial without any risk. If the court refuses him a new trial, he can take a second trial in defiance of the court, under the statute, and then sail into the United States court for another jury trial. For each and all of these reasons, we submit that this law cannot be so construed as to authorize a removal, after the right to another re-examination, under the rules of the common law, has been exhausted, and a second trial has been taken under the second trial statute of Ohio. This finishes what I have to say respectiug the construction of this law.

If the law shall be so construed as to authorize a removal after the right to a new trial is exhausted, and has been refused, and a second trial has been taken under the second trial statute of Ohio, it is all the same to us, because in that event the law is unconstitutional and void.

The seventh amendment to the United States Constitution provides, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." I have heretofore explained what the rules of the common law for another re-examination were, and that they had been exhausted in this case before a second trial was taken; and furthermore, that this is a matter of res adjudicata, by which this court and these parties are concluded, it having been fully adjudicated and settled before a removal of the case was sought. There is no question but that this was a suit at common law; that all the facts were tried by a jury, their verdict affirmed, and judgment entered on it, and that that judgment was in force as a lien on real estate at the very time the order of removal was made, and that no re-examination of this case was obtained under the rules of the common law; and besides, the facts having been tried by the jury, it is a question of no consequence whether

this was a common law case or not, as will be made to appear hereafter. Counsel, however, may attempt to claim that the jury trial which stood (which was not set aside, but was affirmed) was in the State court, and, therefore, that this amendment did not prohibit another re-examination in the United States Court.

Or, to state the matter differently, it is thus:—The court will remember that a second trial under the second trial statute of Ohio is not a new trial under the rules of the common law, but it is a State statutory trial, that is had in all jury cases after jury trial where a new trial can not be had. And in this case, as we have shown, it was taken after a new trial had been refused, and no other trial, either under the rules of the common law or in the contemplation of the law of Congress, could be had. As the second trial statute of Ohio gave the second trial in this case, and not the court, the question arises, whether the State legislature of Ohio had authority to grant this second jury examination in a United States Court, where the practice of the common law and the seventh amendment prohibit it. The question now is not whether a State can give a second jury trial in a State court contrary to the rules and practice of the common law, and for other reasons than those which existed in the rules of the common law for another trial, but whether a State can give a second trial by jury in such cases in a United States Court, when the first trial by jury occurred in a State court, and the jury's verdict was sustained by the court, and a new trial did not lie under the rules of the common law, and had been refused for that very reason by the court. Let us suppose, for a moment, that the legislature of Ohio can control the jurisdiction of the United States Circuit Courts setting in Ohio, and give to them a jurisdiction which they do not possess elsewhere under the laws of Congress, and which they do not claim to exercise elsewhere. We will concede that the right of a State to do this is equal to that of Congress; but does Congress possess the right to say that when a case has been tried before a jury, the jury's verdict affirmed, and a new trial refused, that the case can, in all instances, be re-tried in a United States Court? We say, No, because the seventh amendment to the Constitution prohibits it.

Counsel may, however, attempt to claim that this is an excep-

ted case because the previous jury trial — a trial that stood and was affirmed—was in a State court; but the supreme courts of New York, Massachusetts, and this court say that this amendment applies as much to such cases where another re-examination is sought in a United States Court as if this previous jury trial had occurred in a United States Court, and that any law that authorizes a removal of such a case to the United States Courts for a re-trial on the facts is void, notwithstanding under State legislation or State practice another trial could have taken place in the State courts if the case had not been removed. The decisions on this point are, *The Justices* vs. *Murray*, 9th Wallace, 278; *Parsons* vs. *Bedford*, 3rd Peters, 433; *Wetherby* vs. *Johnson*, 14 Mass., 412; *Potrie* vs. *Murray*, 43 Barbour, 231; 10 Wallace, 25.

By these authorities it will be seen that the two clauses of this amendment are separate and independent, and are to be so construed, and that they secure separate rights. The first clause secures the right to demand and have a jury trial in all common law cases exceeding twenty dollars pending in United States courts. The second clause secures the fruits of a jury trial thus taken againts any encroachment by legislation or the courts, and prevents a United States court from re-examining the case on the facts when a jury trial has occurred and a new trial for the reasons existing at common law does not lie, and had for this reason been refused. The purpose of this last clause was to make the verdict of any jury in any case final on the facts unless it could be shown that the jury had been bribed or tampered with, or that there were other equitable reasons for another trial, such, for instance, as surprise, wrong instructions by the court on the law, and the like.

This last clause of the amendment made a bar against legislatures authorizing another trial for a cause not then known to the rules of the common law; and while that bar exists it can not be crossed by legislation nor by the courts, whether that legislation which attempts to cross it is State or Federal. It gives to the victor the benefit of his jury trial after the trial is through, a benefit that was often tampered with after our English fathers secured the right of a jury trial, and this amendment was to effectually protect us against this grievance of which we complained in the Declaration of Independence — that is, setting aside a jury's verdict without a cause.

The first case that arose in this court under this amendment was that of *Parsons* vs. *Bedford*, 3 Peters, 443. It came from the district of Louisiana. The question was raised whether that was a common law case, and if it was not it was claimed that this amendment did not apply to it. The court, in passing upon the first clause of this amendment, said that it gave the right to demand a jury trial in all cases not of admiralty and equity jurisdiction, and without expressly deciding whether *Parsons* vs. *Bedford* was such a case, the court reached the second clause of this amendment and then said these two clauses were to be construed as separate and independent clauses, standing alone, securing separate rights, and that the second or last clause prohibited any United States Court from re-examining *any fact that had once been tried by a jury* except for the causes established by the common law for a new trial; that therefore, whether the case was *a law, equity, or admiralty case, the facts having been once examined by a jury, they could not be re-examined* in a United States court except for the common law causes for new trial; and therefore it was entirely unnecessary to have had the testimony in the court below reduced to writing, and made a part of the record for them to review the finding of facts that the jury had made. This court did not stop here, but it went on to say that the causes at common law to authorize a new trial must be taken precisely as they existed in 1789, when the amendment was made; and then it went still further and defined what those causes were, saying that they were only such causes as authorized another trial for some error in the proceedings; which causes, as before stated, were included in the motion in this case for a new trial; and this motion was overruled because on investigation it was found that none of these causes existed in this case to authorize another trial, but all equitable reasons were against it.

The next case which arose in this court under the seventh amendment was that of *The Justices* vs. *Murray*, 9 Wallace, 278, which was a case that was removed to this court under the law of 1863, after trial and judgment, for a re-trial of the facts in the circuit court of the United States. In this case, in 9 Wallace, this court affirmed the doctrine that was laid down respecting this seventh amendment in the case in 3 Peters; and it went still further and decided that the last clause of the seventh amendment prohibited a case from being removed after a jury trial in

a State court for a re-trial of the facts in a United States Court unless a new trial had been awarded by the State court under the rules of the common law for some error that had occurred in the proceedings, notwithstanding one or more trials thereafter might have been had in the State courts if the case had not been removed; and to the same point are both the cases in 43 Barbour, 431, and 14 Mass., 412, both of which cases on this point were quoted and approved by this court in the case in 9 Wallace.

The case of *Wetherbee* vs. *Johnson* further settles, that an appellate trial on the facts of the case, is a proceeding unknown to the common law, although at the common law an error proceeding could be taken to a superior court, and the judgment of the court below reversed, if error was found.

The case in 10 Wallace, 25, is that any law that authorizes a case to be removed from a State court to a United States court, after verdict for a new trial, is void; and that the reasons of its being void are too well settled in this court to admit of discussion. The above are the only decisions that have arisen under this seventh amendment; and, taking that amendment as we find it, and as this court has repeatedly fixed its construction, it is not now, and it never will be in the power of legislation or of the courts to remove a case from the State court to a circuit court of the United States, for a re-trial on the facts after a jury trial and the refusal of a new trial, whether it is in an equity or a common law case; and therefore that a second trial statute of a State authorizing a second or appellate trial, on the facts in the State court where the right to a new trial does not exist, and has been refused, did not operate to give a right to remove this case. But the counsel opposed to me claim, notwithstanding these decisions to the contrary, that this amendment has no application to equity cases that have been tried by a jury.

I will quote verbatim from the case of *Parsons* vs. *Bedford*, 3 Peters, 433, to show them their mistake.

In the argument of that case, *Webster & Livingston* made the claim that this amendment has no application whatever to facts that have been tried before a jury in an equity case, and judge McLean assented to this view.

I quote as follows, from the argument of *Webster & Livingston*, to show that this point was urged in that case upon the court:—

"The plaintiff in error contended—

"3rd. It is not strictly a common law proceeding, but a proceeding under the peculiar system of Louisiana; and, according to that system, the court has power to reverse the judgment under circumstances which would not give it that power when the trial had been according to the common law," 3 Peters 436.

"This case cannot come within the amendment. It is not comprehended by it, nor can it have any application to it; the amendment was adopted when all the proceedings in the courts of the United States, and in the courts of the different States, were under common law; and the plaintiff in this case has a complete remedy, independent of the amendment. It was intended to guard the rights of citizens proceeding according to the common law, and it only provides that the decisions of juries shall not be set aside except according to the common law, 3 Peters, 437, 8.

"Judge McLean's dissenting opinion was in these words:—"This redress cannot be given, it is urged, because, if the testimony had been taken down, it could have been of no advantage to the plaintiff in error, as this court could not examine it; and why may not this testimony be examined by the court the same as in the case of Armor? The facts are the same, and no difference exists in the merits of the claims."

"The reply is that in this case a jury passed upon the claim; and in the other the court exercising the functions of a jury, decided both the fact and the law. The difference then consists in this,—that the jnry found the facts in the one case, and the court in the other; and in both cases the law was pronounced by the court. This difference in the mode of decision it would seem ought not to affect the judgment of this court, unless there be some positive provision of law which must control it.

"The seventh article of this amendment of the Constitution is referred to as as conclusive on the point. It reads in all suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

"To this objection an answer may be given, which to me is satisfactory.

"This is not a suit at common law, and therefore does not come strictly within the provision of the article."

This court, however, took a different view. It was satisfied that the second clause of this amendment secured the fruits of any jury's verdict as much in an equity case as in a case at common law, and that it prevented it from being set aside and another trial being had in any United States court, except for the reasons established by the rules of the common law, to set aside a jury's verdict, and so decided in these words:—

"But the other clause of the amendment is still more important; and we read it as a substantial and independent clause:—'No fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law, etc.' The only modes known to the rules of the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a venire facias de novo by an appellate court for some error of law, which intervened in the proceedings," 3 Peters, 447-8.

The above decision has been affirmed by all subsequent decisions. The last decision on the point is that of *McKee* vs. *Rains* 10 Wallace 25, and it is a fair notice to the bar, to never attempt to raise this question again. It is as follows:—

"And if neither of the points were decisive, the fatal objection to the attempted removal would remain, that no application was made until after verdict; and the Constitution provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law. All these propositions have been so recently determined by this court, that nothing more is now necessary than to state them as settled."

The above case was one in which the verdict of the jury had been obtained in a state court; and afterwards the defeated party not having obtained a new trial under the rules of the common law, sought to remove the case into the circuit court of the United States, for a re-trial on the facts—all of which is true respecting the case at bar.

The counsel who are opposed to me in their second brief, state:—"If, however, this were a suit at common law, still less would the seventh amendment apply to our prejudice; for under that amendment the defendant in error will be entitled to a trial by jury in the circuit court."

What an utter misconception of the meaning and purpose of the seventh amendment, and of the decisions relating to its construction!

The cases of *McKee* vs. *Rains*, 10 Wallace, 25; the *Justices* vs. *Murray*, 9 Wallace, 274; 43 Barbour, 331; *Weatherbee* vs. *Johnson*, 14 (Mass.), 412, were each common law cases, in which the right to have demanded a trial by jury in the United States circuit court would have existed, if it had not been the purpose of this amendment to prevent a removal for such a purpose; for each of these were damage cases in which the right to demand a jury trial existed at common law, and neither party could have been denied this right in the circuit court. But the purpose of the amendment is to prevent a re-trial of any case in a United States court, that has once been tried by a jury, except where a new trial is obtained for the reasons given by the rules of the common law to set aside a jury's verdict; and, therefore these cases could not be removed for re-trial where a new trial under these rules had not been obtained, and for this very reason the removal of these cases was refused, notwithstanding another jury trial could have been demanded in the circuit court.

No question arises in this case as to whether a chancellor can decree according to his best judgment after verdict. He has the same right to set aside the verdict in such a case as in a common law case; but the chancellor in this case did not set aside the verdict but affirmed it. Counsel mistake themselves when they say that Mrs. Dunn, in her case, asserted no legal, but purely an equitable claim. If there had been no legal claim there would have been no right to demand a jury or take a second trial. The Ohio code has not enlarged the right of jury trial, This suit, at the time the seventh amendment was made, would have required two separate suits: one a suit in equity to reform the policy; then, after the policy had been reformed, another suit to recover, which would have been a suit at law, for the Company claimed that if the policy had first been made as we claimed they agreed to make it, still they were not liable. The equity practice throughout the land in the last century has so changed that such matters, legal and equitable, which before took two separate suits, are now blended in one. Before this suit was brought, I studied this subject closely, and I found my authority for blending this suit all in one, not in the

Ohio code alone, but in works of equity jurisprudence; because equitable and legal rights are now blended in one suit that took two suits at the time the amendment was made. the right of trial by jury cannot be cut off, in such a case as this, as to the legal part in any court, because this would abridge the citizen's right secured by the Constitution, to have a jury trial on all common law issues, nor can such a case, that has been tried by a jury, after their verdict has been affirmed be removed into a United States Court for a re-trial.

Counsel next call our attention to the Nebraska case, and to the Wisconsin case of *Ackerly* vs. *Vilas*, as decided by Judge Miller, and the case in 9 Blatchford, as cases that support the order of removal made in this case.

In all three of these cases a new trial had been granted under the rules of the common law before a removal was sought; and at the time the order of removal was made, they were still pending on new trial, without any judgment or judgment lien in the case.

In the case of *Ackerly* vs. *Vilas*, Judge Miller impliedly said that the order of removal in that case was proper because a new trial had been granted, and that it could not have been had before a new trial was obtained, nor after a new trial had been refused. If these cases make any authority for the attempted removal of this case after a new trial had been sought, but refused because the case did not authorize a new trial and the jury's verdict had been affirmed, and a judgment entered on it, and a second trial had been taken under the second trial statute of Ohio, leaving this judgment, obtained at a former final trial, in full force as a lien on real estate, and at that very time having the operation and effect of judgments in cases pending on appeal, then the counsel opposed to me are welcome to them. None of these decisions apply to the construction I have claimed for this law, nor to the question of its constitutionality, because they come within the exception of the amendment, being in cases where a new trial had been obtained under the rules of the common law. They fall under the second class of authorities named at the opening of this argument.

I think it has been shown conclusively that if this law of March 2nd, 1867, can be so construed as to authorize the removal that was attempted of this case, then the law is void, and

that, however it is to be construed, it neither divested the State courts of jurisdiction nor did it invest the United States Circuit Court with it.

After a transcript of this case had been lodged in the Circuit Court of the United States, we filed a motion there to have the case remanded because it had been ordered to be removed without authority of law. That court differed with us in this view and overruled our motion. By this proceeding it is claimed that we are estopped from questioning the propriety of the order of removal, and that we were estopped from proceeding thereafter in the State courts to have the order of removal set aside as erroneous. It used to be the law that any party could appear in any court and file a motion for the purpose of questioning the court's jurisdiction, and argue such motion; and that such an act would not invest the court with any jurisdiction to retain the case. I am satisfied that this is still the law, and I challenge counsel to show that it is not. But counsel next claim that if this is all so and the order of the circuit court was erroneous or void, that we had a right to come here directly from that court on that order to have it reversed, and that because we had this optional right we were bound to pursue it. They are unable to quote any authority for this claim except the bare assertion of their own opinion. If I am not misinformed, it is not the usual practice to take questions, arising in the lower State courts on the construction of a United States law on error, from such lower State courts to this court through the Circuit Court of the United States. The law points out that they shall be taken on error, first to the highest court of the State, and then, on such order or decision of that court, directly to this court. This course is given by the 25th Section of the Judiciary Act to every citizen. It was pursued in this case even by these counsel who object to it. It has been the usual course for over eighty years, and we think it is too well grounded to be shaken now.

Jurisdiction cannot be given to a United States court by the consent of parties, or by their acts, where it does not exist by law; where it exists by law, then parties by their acts can give to these courts, or any other courts, such jurisdiction as the law has authorized the court to take, and they can give no other or further jurisdiction.

We could not give the United States Circuit Court appellate jurisdiction over this case, because the law did not authorize the case to be removed after a second trial had been taken, and therefore the law did not authorize that court to take appellate jurisdiction of it by our appearance, or by any thing that we did or could do. The laws of the United States give to the circuit courts of the United States original jurisdiction over such a case as this, because one party is a resident and the other a non-resident found within the district.

When we filed our amended petition in the United States Circuit Court, we started a new suit against this plaintiff in error. Until that time practically speaking there was no suit in that court. Any judgment or order that court might have rendered before that would have been void, it not having acquired jurisdiction over the case according to any valid law of the United States. After this amended petition was filed no further steps were taken in this new case in the United States Court except this, the counsel on the other side filed a motion to have it stricken from the files, claiming that the pleadings must be made up anew as if there had been no pleadings in the State court. That motion is still undisposed of. This new suit in the Circuit Court did not abate a former suit between the same parties concerning the same subject matter then pending in the State courts, as I have shown by the authorities quoted in my former brief; but if the suit in the United States Circuit Court had proceeded and been reduced to final judgment, it would then have become a bar to the suit in the State courts, as the same authorities show.

We concede that if the order of removal was authorized by law that the subsequent order of the State district court, reversing that order, and the order of the Supreme Court of Ohio affirming this order of the district court, were void; and that, if this plaintiff in error had done nothing more in the case after that in the State court, that this court would have been bound to reverse said order of the Supreme Court of Ohio. But this case is otherwise now, even if the order of removal was right, because this plaintiff in error has since that time done acts that appear in this record that estop him from denying the jurisdiction of the State courts, as I have shown by authorities quoted on pages 19 and 20 of my former brief. This court must take notice of this matter of estoppel without its being plead by us, because it appears in the record of this case as a part of it.

These are the acts of estoppel to which we refer: After the Supreme Court of Ohio decided that the order of removal was wrong, and that the State courts still had jurisdiction of the case, the plaintiff in error went back into the State court and took a long deposition in the case to be used when the case should come up on its second trial. At the second trial he appeared and defended, and did all that he could or would have done if the order of removal had never been attempted. He was defeated. He then filed his motion for a new trial, and argued it with great force and power; not that the court had not jurisdiction, but that the verdict was unwarranted by the law and the evidence in the case. The motion for new trial was then overruled, and another final judgment was entered in our favor for $2525, interest and costs.

The plaintiff in error then filed a petition in error in the district court of the State to reverse this final judgment for $2525, not because the court had no jurisdiction to render it, but because the verdict of the jury was wrong, and the order of the court overruling the motion for new trial and giving final judgment was contrary to the law and equity of the case, admitting the jurisdiction. We were summoned to appear and defend this suit in error that the plaintiff in error brought in the State court to test the verdict of the jury and the judgment rendered on it in the court below. We did so. The result was another order affirming the final judgment in the court below for $2525. That judgment is in full force to-day unvacated and unreversed, and it is as we claim an estoppel against this plaintiff in any court of the world that he may appear, asking to have the subject matter of it re-heard; and being in this record it precludes this court from sending this case into the United States Circuit Court for the purpose of having it re-heard there. If this judgment had been against us it would have concluded us, and it must now conclude the plaintiff in error, as it was rendered in a court that he sued in, and upon new pleadings that he filed in the case after the order of removal was made, and we were a defendant in; and aside from this, the law has no favored suitors that we should be concluded by such a proceeding and he not.

The jurisdiction of the State court to render this judgment and the estoppel of it, even if the order of removal was right, arise in this way, as I have shown by authorities found on pages

19 and 20 of my former brief. The State court had original jurisdiction in this case. The right to remove this case was a personal privilege to be exercised in time, and after it was exercised it could be waived, and jurisdiction re-invested in the State court by the plaintiff in error re-appearing in the State court and asking it to adjudicate on the merits of this case, which he did in the district court. After the Supreme Court of Ohio had decided that the order of removal was wrong, and that the State courts had jurisdiction of this case, the plaintiff in error could not re-appear thereafter in the State courts to have that question re-heard, or to save any of his rights under it, because no State court thereafter had a right to reconsider the question of jurisdiction. His remedy was not to re appear thereafter in the State courts at all, but go at once to this court, and thereby supersede proceedings there until the question of the jurisdiction of that court was determined by this. The law did not give him a double advantage and deny any part of the same redress to his adversary. Therefore when the plaintiff in error re-appeared in the State courts, filed new pleadings there relating to the merits of the case, and summoned us in to defend his attempts to get a final judgment against us, he gave original jurisdiction to the court to render such a judgment against him. He cannot now turn around and repudiate the original jurisdiction he thereby clothed the State courts with, and he is as much bound by the final judgment in the State court for $2525, that is unvacated and unreversed, as we would have been bound by such a judgment in the Circuit Court if the new case there had been reduced to final judgment under the same circumstances.

The counsel for plaintiff in error say in answer to this judgment for $2525 in the State court, which was obtained in part at their instance in an effort of theirs to obtain in that court such a judgment against us, is answered by the cases of *Kanouse* vs. *Martin*, 14 Howard, 33, 15 do 198, and *Stevens & Dwight* vs. *Phœnix Ins. Co.*, 41 N. Y., 149. It is strange to me that counsel so able to discriminate should have quoted these authorities that no more bear out this point than did the authorities sustain them which they quoted in relation to the seventh amendment. Their inability to find any authority to sustain their views is my apology for their quoting these. These authorities only establish what we conceded at the outset; that is, that if the plaintiff in

error had come here as soon as the decision of the Supreme Court of Ohio (reported in 20 O. S. 175) was rendered; or if after that was rendered he had waited four years and eleven months without going back into the State courts, endeavoring to settle matters there relating exclusively to the merits of the case, this court would be bound to reverse the judgment of the Supreme Court of Ohio. We concede that if the order of removal was right we could not by any act of our own re-invest the State court with jurisdiction over this case, nor could the plaintiff in error be refused the proper remedy in the State court to have the propriety of the order of removal reviewed, and, when settled in the State court against him, he could not be refused the right to come here by any act of ours.

This is not the point at issue. It is whether a defendant can not, by his own acts, waive his right to remove the same as any person or party can waive and relinquish any right belonging to him, and where it would be against conscience and good equity for him to assert his former right by reason of his own conduct in the premises, is he not to be estopped from asserting it? and the duties and obligations of the law being reciprocal, why should he seek a remedy in a court of justice that had original jurisdiction to award the remedy? And then, when unsuccessful, with a final and conclusive judgment of such court against him for $2525, that is unreversed and unvacated, shall he be allowed to repudiate the jurisdiction of the court which rendered it on his process and pleadings at his instance? In either of the cases (that are in 14 and 15 Howard and 41 N. Y.) referred to, if the party seeking to remove had appeared in the case before he filed his motion to remove, he would have been refused the right of removal. If, after he filed his motion to remove, he had filed a demurrer in the case going to its merits, or he had filed an answer, he would have been denied the right to remove. It is on this principle that we claim that the plaintiff in error, having filed new pleadings in this case in the State court relating exclusively to its merits after he attempted to remove it, and having done other acts of the same nature adding greatly to the expense in the State courts, that we ask he should be estopped from questioning the jurisdiction of the State courts.

In relation to the record of what was done in this case in the Supreme Court of Ohio, I find that I am partly mistaken; that a

part of the proceedings there are in the printed record of this case, and the balance will be supplied by me on motion. My purpose in this is only to have the record complete, and not have this petition in error dismissed as improperly drawn, or directed to the judgment of the wrong State court. If the pleadings and process of the plaintiff in error are not right to give this court jurisdiction to reach and decide this question now, we waive all such informalities to have it settled now, for in March it will be nine years that this great corporation has baffled this old, destitute, and dependent widow out of that which two juries and three judges long since said she is justly and legally entitled to receive. If she does not receive it soon it will do her no good, for death will have taken her to her final home.

Having treated, in my two briefs, of every question which I think can arise in the case, and dwelt very fully in my first brief on the authorities respecting it, I submit them both to the court in the full belief that they will receive such consideration from the court as the case entitles them to, and that the judgment which the court will render will be such as the law requires in the premises.

W. H. STANDISH,

For Defendant in Error.

CINCINNATI, *January 8th*, 1874.